(16,827.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 264.

THE CITY OF RICHMOND, PETITIONER,

vs.

THE SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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a *Transcript of Record.*

United States Circuit Court of Appeals, Fourth Circuit.

CITY OF RICHMOND, Appellant,
versus
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, Appellee. } No. 241.

Appeal from the circuit court of the United States for the eastern district of Virginia, at Richmond.

Record filed September 14th, 1897.

[Stamped:] Clerk's office, U. S. circuit court of appeals, fourth circuit. H. T. Meloney, clerk, Richmond.

1 *Transcript of Record.*

In the Circuit Court of the United States in and for the Eastern District of Virginia.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, Plaintiff,
vs.
CITY OF RICHMOND, Defendant. } In Equity.

Be it remembered that heretofore, to wit, on the 6th day of October, 1896, came The Southern Bell Telephone and Telegraph Company, the plaintiff in the above-styled cause, and filed its bill of complaint against the City of Richmond, which said bill is in the words and figures following, to wit:

Bill of Complaint.

Filed October 6th, 1896.

In the Circuit Court of the United States for the Eastern District of Virginia.

SOUTHERN BELL TELEPHONE AND TELEGRAPH Co., Plaintiff,
vs.
CITY OF RICHMOND, Defendant.

To the judges of the circuit court of the United States for the eastern district of Virginia:

The Southern Bell Telephone and Telegraph Company, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of New York, and a citizen of the State of New York, having its residence, principal office and chief place of business in the city of New York, in the State of New York, brings this its bill against the City of Richmond, a municipal corporation,

incorporated and existing under the laws of the State of Virginia,
and a citizen of the State of Virginia, having its place of resi-
2 dence, its principal office and chief place of business within
the territorial limits of Henrico county, in the State of Virginia, in the eastern district of Virginia.

And thereupon your orator complains and says, as follows:

That the matter in dispute in this cause exceeds, exclusive of interest and costs, the sum or value of twenty thousand dollars ($20,000.00); indeed, vastly exceeds said sum or value.

That your orator, a foreign corporation, organized and existing as aforesaid, is engaged in the business of a telephone company, and of constructing, maintaining and operating telephone lines in, through and between the States of Virginia, West Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida; that your orator has been engaged in said business for a period of about fifteen years; that during nearly the whole of said period your orator has continuously maintained at various places in said States and in the city of Richmond, Va., an exchange, poles, wires, instruments and all other apparatus and property necessary for the maintenance and operation of telephones and telephone lines, and has erected and maintained, through and along certain of the streets and alleys of the city of Richmond, a municipal corporation in the State of Virginia, numerous poles and wires for conducting its said business, which was and is the transmission of communications by electricity between different persons and points; and that your orator has so conducted its said business, and has so erected and maintained its said lines, wires and poles under and by authority of the common council and board of aldermen and authorities of the city of Richmond, the legislature of the State of Virginia and acts of Congress of the United States.

That in the conduct of its business as aforesaid, your orator maintains in the city of Richmond an office or exchange, supplies and instruments connected by wires with a large number of subscribers, and with the office of the Western Union Telegraph Company in said city, and that your orator has now in the said city of Richmond a large number of such subscribers, each and all of whom may be, and many of whom are, connected through said exchange with the office of said Western Union Telegraph Company, and may, and many of such subscribers do, transmit and receive through the instruments on their said premises, through said exchange to and from the office of the Western Union Telegraph Company, messages addressed and intended to be sent and received and which
are sent to and received from points in other States, in the
3 District of Columbia, and foreign counties; your said orator
having for years received and transmitted such messages in this manner under agreement still in force; and it also has subscribers outside of the city of Richmond, whose 'phones connect with the other 'phones of your orator in said city, by and through the means of wires and poles of your orator located on and along the streets and alleys of the said city, many of which customers have no ready and convenient access to said telegraph company

except through the use of your orator's wires and polls for the transmission and receipt of telegrams between them and points outside the State of Virginia, and use said 'phones, wires and poles of your orator in connection with said Western Union Telegraph Company, for that purpose, under and by virtue of an agreement between your orator and said Western Union Telegraph Company for the joint use of the poles and fixtures of said companies in sending and receiving such messages; and that part of such transmission from the office of your orator's subscribers to and from the office of the Western Union Telegraph Company, of messages addressed and sent by telegraph to and from points outside of the State of Virginia, to the District of Columbia and to foreign counties, is interstate commerce, and is commerce between said points outside of the city of Richmond and the city of Richmond, and other States and the District of Columbia and foreign countries and is a necessary part of the business of your orator, and that its said wires in the city of Richmond, and its poles, to which they are attached, are used for that purpose, and that, therefore, your orator's business in the city of Richmond is not confined to telephonic messages between different points in said States and in the State of Virginia, and it is the intention and purpose of your orator to continue in the future, as it has in the past, from time to time to extend its business and build its lines still more across and beyond the city of Richmond and State of Virginia into other countries and States.

Your orator further states that its wires, poles and lines used along and over the streets of said city constitute a part of the postal service of the United States.

That your orator's subscribers in said State include in their number most of the important business establishments doing business in said States, including railroads, factories, commercial houses and offices; and it also connects with a large number of private residences; that in the transaction of its business your orator is called upon to make telephonic communication and connection in
4 residences to very large number of calls, each and every day, and to place its subscribers in communication, not only with other subscribers in the city of Richmond, but with the correspondents of subscribers through its connection with the Western Union Telegraph office, in the other States of the United States, the District of Columbia and foreign countries; that in the way of such communication between its subscribers in Richmond and other correspondents in other States, the District of Columbia and foreign countries, your orator makes numerous communications each and every month through its said exchange in the city of Richmond.

Your orator further avers that its said business has become, and is an essential and necessary part of the business of its subscribers and their correspondents outside of the city of Richmond and the State of Virginia, and that any interruption therewith would cause an immediate and serious disturbance and damage to your orator and to the business interests of its subscribers.

That the business and status of your orator is that of a telegraph company, under the laws of the United States and of the State of

Virginia, and of other States of the United States, and that it was, and is in fact, chartered as a telegraph company under the general telegraph laws of New York.

Your orator further states that the establishment of its plant, lines, poles and wires in said city cost many thousand dollars in excess of $20,000, and is worth now more than it cost, and that its annual business in said city has been for years, and is now worth more than $5,000.

That your orator on or about the 13th day of February, 1889, duly filed with the Postmaster General of the United States, its acceptance of the act of Congress of the United States, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," approved July 24th, 1886, by which it was, among other things, provided that "any telegraph company which was then organized, or might thereafter be organized, under the laws of any State, and which should file a written acceptance with the Postmaster General of the restrictions and obligations of said act, should have the right to construct, maintain and operate lines of telegraph, over and along any of the military roads and post-roads of the United States which had then or might thereafter be declared such by law." A copy of which acceptance is herewith filed, marked "Exhibit A" and prayed to be taken as part of this bill.

5 That by virtue of said acceptance of said act, your orator under the provisions thereof, became entitled to and ever since said acceptance has been and is now entitled to construct, maintain and operate lines of telephones over and along any of the military roads and post-roads of the United States, which had then been or might thereafter be declared such by law.

That the streets, alleys and highways of the city of Richmond are, and at the time herein stated were, and now are post-roads of the United States, declared so to be by the laws of the United States.

That the several departments of the Government of the United States located in the city of Richmond, have used, and at the present time do use, in said city your orator's electrical conductors, and other facilities for the transmission of instructions, orders and information to other officers and agents and to other persons in the administration of governmental affairs and on other business throughout the several States and the District of Columbia and in foreign countries.

That your orator under and by virtue of the statutes of the State of Virginia, Code, section 1287, is authorized and empowered to construct, maintain and operate its lines of poles and wires, with necessary facilities along and over the streets of any city or town in the State of Virginia with the consent of the council thereof, and under and by virtue of the power and authority therein conferred, all of which was additional to the right given your orator by the act of Congress hereinbefore referred to and now maintains and operates its lines in the streets of the city of Richmond, and has in all respects complied with the legal obligations and requirements imposed.

That relying upon its right to erect, maintain and operate its lines along and over the streets and alleys of the city of Richmond, it entered upon said streets and alleys and has conducted its business and executed its contracts, of which a large number are now in force, to furnish and afford telephonic facilities to the residents of Richmond and to persons outside of the city of Richmond, and with the officers and agents of the Federal Government.

Your orator further shows that under the act of Congress of 1866, the provisions of which it has long since accépted, as is shown by the certified copy of its acceptance herewith filed, it was and is entitled to maintain and operate its lines through and over the streets and alleys of the city of Richmond, without regard to the consent of the said city, and it did in fact locate many of its poles and
6 wires and begin the operation of its business without applying to the said city for permission so to do. The said city, however, on the 26th day of June, 1884, after your orator had begun to operate its business along and over the streets and alleys of said city, in pursuance of the power given it under section 1287 of the Code of Virginia, which provides that "telephone companies may construct, maintain and operate their lines along and over the streets of any city or town with the consent of the council thereof," passed an ordinance by which "permission was granted the Southern Bell Telephone and Telegraph Company to erect poles and run suitable wires thereon for the purpose of telephonic communication throughout the city of Richmond, on the public streets thereof, on such routes as may be specified and agreed upon by a resolution or resolutions of the committee on streets, from time to time, and upon the conditions and under the provisions of this ordinance." The 2nd and 3rd provisions of this ordinance provide for the use of the poles of the company, by the city, for its fire-alarm and police telegraph, without charge and for a special and lower rate for the use of the company's 'phones and service by the city, which advantages to the city have been enjoyed by the city constantly for years.

The fourth section provides against injury to shade trees and how the work of putting in poles, etc., is to be carried on. The fifth section provides that "the ordinance may at any time be repealed by the city of Richmond; such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law." A copy of this ordinance is herewith filed, marked "Exhibit K," and prayed to be taken as a part of this bill.

Your orator further alleges that although it had begun its operations before the passage of the ordinance aforesaid, yet after the said ordinance was approved and became an ordinance of the said city, it, in pursuance thereof and of resolutions adopted from time to time by the committee on streets and pursuant to the permission and rights so granted and obtained, and relying thereon as well as of the rights granted and conferred by the laws of the United States and of the State of Virginia hereinbefore referred to, and before the attempted repeal of the said ordinance of June 26th, 1884, erected poles and wires and constructed, maintained and operated, and still maintains and operates, telephone lines in the streets of the said

city of Richmond, and its poles and wires in the said city of Richmond are now located in accordance with the provisions of the said ordinance of 1884, as well as under the provisions of the said law of the United States and of the State of Virginia.

7 Your orator was thus firmly established in its position on the streets and alleys of the said city, and was actively engaged in the exercise of its business—carrying out faithfully its obligations imposed on it by law and its contract with said city and the public, when the said city of Richmond, through its officials, began to make requests and demands of it not only unwarranted by anything in its agreement with said city, but which were injurious to your orator's business.

Thus an ordinance was passed and approved July 18, 1891, which undertook to give the committee on streets of the city of Richmond the right to require your orator to allow "any other person or company to place upon its (your orator's) poles * * * any telegraph, telephone, electric light, electric power, electric car wires or other wires used in connection with the transmission of electricity," on terms to be agreed upon by the owner of the poles and the person or company wishing to put its wires on them; and if they could not agree, then the terms were to be settled by arbitration.

This ordinance was so clearly in conflict with the rights of your orator, and so manifestly void, that the city attorney of Richmond advised the city that it could not be enforced.

Threats were, however, made by some of those in authority in the said city that unless your orator submitted to the requirements of this ordinance that it would be driven from the city and its business broken up and ruined. Again early in the year of 1894 the said city mentioned to your orator its desire to have a certain number of 'phones furnished by your orator free of charge, and, after some negotiations about this matter had taken place, the city caused to be addressed and delivered to your orator's manager in the said city a letter, in which it was stated that the committee on grounds and buildings had directed the writer, the city engineer, to "state their requirement" that your orator should furnish thirty 'phones free of charge for the use of said city.

A copy of this letter is herewith filed and marked "Exhibit B," and prayed to be taken as a part of this bill.

After some delays and correspondence, your orator declined to acquiesce in this requirement of said city, as it had a right to do, and submitted the proposition contained in its letter of the 2nd of November, 1894, a copy of which, marked "Exhibit C," is herewith filed and prayed to be taken as a part of this bill, and to this received a reply increasing the demand of the city to thirty-nine free 'phones. This reply has been mislaid, but a copy of it,

8 marked "Exhibit D," will be filed with this bill, if it can be found. To this reply your orator replied by letter of the 5th of November, 1894, a copy of which, marked "Exhibit E," is herewith filed and prayed to be taken as a part of this bill.

Constant and continued threats were made during this correspondence of the destruction of your orator's business and of driving

it from the streets and alleys of said city if these illegal and burdensome requirements of the said city were not acquiesced in, and agreed to, and upon failure of your orator to submit — such requirements, which not only were injurious to its business, but were in conflict with its rights guaranteed it by the law of Virginia and the statutes and Constitution of the United States, the ordinance of the 14th of December, 1894, a copy of which is herewith filed, marked "Exhibit F," and prayed to be taken as a part of this bill, attempting to take from your orator its rights and franchises, was passed, which provides: "That the ordinance approved June 26th, 1884, granting the right of way throughout the city to the Southern Telephone and Telegraph Company be and the same is hereby repealed

2nd. That in accordance with the 5th section of said ordinance all privileges and rights granted by said ordinance shall cease and be determined at the expiration of twelve months from the approval of this ordinance by the mayor."

On the 10th of September, 1895, two other ordinances of said city imposing taxes and fines on your orator, as well as on other companies, for using poles and wires were passed. Copies of which marked G and H are herewith filed and prayed to be taken as a part of this bill.

Under one of these ordinances your orator was required (under penalty of ruinous and unreasonable fines) to petition for the privilege of erecting and maintain-g poles and wires, where they now are "in accordance with the conditions of this ordinance and such other conditions as the council may see fit to impose." And the very first condition to which this company would have to consent, if it made the petition, was, if the company failed to obtain permission asked for, it was to remove its poles and wires from the streets and be liable to fines amounting to thousands of dollars for not doing so.

The ordinance which required the wires to be placed under ground has been amended so as to extend the time for this being done to 15th June, 1897.

Your orator is advised and maintains, that its rights under the ordinances of the city of Richmond, even if the 5th clause of
9 the ordinance of June, 1884, and of December, 1894, are valid, entitled it to maintain its poles and wires in the streets of said city where they had been placed under resolutions of the committee on streets from time to time.

The first clause of the ordinance of 1884, gave the company the right to run wires and erect poles on the streets of Richmond, on such routes as may be agreed on by the committee on streets from time to time.

And the 5th section provided that the ordinance might be repealed at any time by the city council, such repeal to take effect 12 months after the passage of repealing ordinance.

Your orator submits that the power to repeal an ordinance allowing the erection of poles and running of wires in the streets on such routes as may be agreed on by the committee on streets from time

to time (attempted to be reserved in the 5th section) does not, and cannot, give the power to compel the removal of poles and wires erected on places designated, and destroy thousands of dollars' worth of property acquired under the ordinance while in force, but was simply intended to prevent, after its repeal, the further extension of the erection of poles and running of wires on such routes as may be agreed on by the committee on streets from time to time.

Not only does the 5th section of ordinance of 1884 not authorize or compel the removal of such poles and wires as may have been erected whilst this ordinance was in force, but the ordinance of December, 1894, does not attempt any such wanton and ruthless disregard of the contract rights and destruction of the property of your orator.

It repeals the ordinance and then, specifying what it intends by this, goes on in the second section to say, in speaking of the repealed ordinance, "all privileges and rights granted by said ordinance shall cease and be determined."

"All privileges and rights granted by the said ordinance" are defined by the first section of it to be the permission to erect poles and run wires on such routes as may be specified and agreed, &c., from time to time. The erection of poles and running of wires from time to time on such new routes as might be agreed on are the privileges and rights repealed, and nothing more—if the language of the repealing ordinance and that of the original ordinance be regarded. This company would never have gone to the expense it has in starting and carrying on its business in the city of Richmond, had it supposed for an instant that it held its rights and property subject to the power of the city council at any time to destroy and ruin them, and it insists that the interpretation now sought to be put upon the two ordinances of 1884 and 1894 by the said city is not the true and proper one, and that they do not, and never did, contemplate or authorize the city to compel the removal of the poles and wires of this company, properly located by and with the permission of the committee on its streets, as is contemplated by section 12 of the ordinance passed 10th September, 1895, which provides ruinous fines for allowing poles to remain on the streets of the said city after the 20th of December, 1895.

Your orator further insists that the 5th section of the ordinance of 1884 is and was null and void.

The city council had no authority under the act of the legislature of Virginia, hereinbefore referred to, to annex conditions to its consent to the use of its streets—certainly not to insert a condition which repealed the consent at the option of the city, and was, therefore, inconsistent with it. It should either have granted or refused permission for their use. The legislature carefully provided for its right to repeal and alter and modify the rights of telephone companies in section 1290 of the Code of Virginia.

Your orator, therefore, insists that even if the interpretation of the ordinances be as the city contends, still that the city of Richmond, in attempting to provide by such ordinances the right to take from your orator its vested rights and destroy its property, has ex-

ceeded its powers, and that such ordinances are unreasonable, *ultra vires*, unconstitutional and void.

Your orator further insists that, having accepted the provisions of the act of Congress of 1866, it is entitled to all the rights given thereby, independent of and superior to the consent of the city of Richmond. One of these rights is the right to "construct, maintain and operate" its lines "over and along" the streets of the said city.

The language of the act is: "That any telegraph company now organized, or which may hereafter be organized, under the laws of any State of this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been, or may hereafter be, declared such by act of Congress.

Your orator asserts that telephone companies and their business are embraced by the terms of this act, and that, in fact, telephone and telegraph companies are, for the purposes embraced by this act, one and the same.

Your orator charges that the post-roads spoken of in this
11 act are not limited to routes on the public domain, but embrace all post-roads of the United States which have been or may hereafter be declared such by act of Congress.

This being so, and the streets and alleys of the city of Richmond being post-roads, it is confidently claimed by your orator that it has the right under this act to occupy the streets and alleys of the city of Richmond for its purposes, guaranteed to it by the Constitution and laws of the United States, superior to any power in the said city to prevent it from so doing. Under this power, your orator claims not only the right to maintain its present poles and wires along the streets and alleys now occupied by it, but to extend them to other streets and alleys as its business, and the business interests of the country and its patrons may require.

Your orator further charges that the said city has granted to the Richmond Standard Telephone Company, a rival telephone company of your orator's, the right to erect poles and wires along many of the same streets and routes which your orator occupied in said city; has allowed said Richmond Standard Telephone Company to put its poles alongside of, close to the poles of your orator, and has allowed said company to string its wires close to, and, in many instances, touching the poles of your orator, thus showing, your orator submits, that its action in attempting to drive your orator from its streets and alleys was taken, not on account of the interference of its poles and wires with the ordinary travel on said streets and alleys, or any inconvenience arising from the occupancy of the streets and alleys thereby, and your orator avers and charges that no such interference or inconvenience, in fact, existed or exists.

Your orator further charges that said city claims the right not only to prevent your orator from extending its lines along other streets and alleys in said city, from connecting new subscribers along its routes now used and occupied, from putting up new and addi-

tional wires along said routes, from replacing old and defective poles and wires along the routes now used by it with new ones, but claims the right to compel your orator to remove said poles and wires now used by it, and to cut them down itself, if it should see fit, and though your orator had made application to the proper authorities of said city to designate the character of poles as under the 4th section of an ordinance of said city, approved 10th Sept., 1895, they are required to do, to be put in the place of poles which are defective and dangerous along its routes, not only was this request not noticed, but the response has been a resolution by the street committee passed upon the statement of one of the committee that "the time had now arrived to take some decisive action to rid the streets of your orator's poles," asking the city attorney and engineer to inform them how the poles of your orator can be gotten rid of. There have been for some time reports that its poles were to be cut down, and it fears, and has reason to fear, it submits, that such action by the city will be taken, and so taken as to ruin its business before it can stop it, if it delays action until the cutting of poles begins.

12

Your orator further states that the officers of said city not only openly proclaim that it has no right to occupy its streets and alleys or carry on its business in the same, but the ordinances hereinbefore mentioned are a standing and constant threat and menace to its rights and privileges, and serve as they were intended to do, to deter and do deter persons who would use its 'phones, from making contracts to do so and from doing so, and have caused many of its subscribers to abandon and give up the use of its 'phones for fear that it will be prevented from giving them service, and its customers are thus driven off to the Richmond Standard Telephone Company, and that by these means its business is being, and will continue to be, as surely injured as if its poles and wires were being cut down and destroyed.

Your orator is advised, and, therefore, states that its contract rights, its franchises and property vested in it are protected by the laws and Constitutions of the United States and of the State of Virginia, to which it confidently appeals for protection against the threatened destruction of them by the city of Richmond; that unless afforded protection in the premises, as asked for in this bill, its property will be destroyed, its business, which it has at great labor and expense built up, ruined, its patrons and customers in and outside of the State of Virginia put to great trouble, inconvenience and loss; your orator will be prevented from carrying out its contracts with its customers, and be thus subjected to the danger of numerous claims for damages and of a multiplicity of suits; and that your orator will suffer great and irreparable wrong and injuries and incalculable loss for which no adequate compensation can be made.

To the end, therefore, that justice may be done, and forasmuch as your orator is remediless in the premises save in a court of equity, it prays that proper process may issue that the City of Richmond may be made a party defendant to this bill, but answer under oath

from it is hereby expressly waived; that said city and all others, its agents and employees, may be restrained and enjoined from removing or interfering with its poles and wires in said city and
13 from interfering with the right of your orator to use said poles and wires, and that all proceedings by said city or its agents and all others to prevent your orator from continuing, renewing, repairing and extending its lines, wires and poles in, along and over the streets and alleys of the said city, and to inflict fines and penalties on your orator for so doing, may be restrained and enjoined; that the right of your orator to use said poles and wires and to carry on its said business along and over the streets of the said city be declared and defined; that the ordinances of said city of the 14th of December, 1894, and of the 10th of September, 1895, so far as they undertake to prevent your orator from maintaining and using its lines, poles and wires over and along the streets and alleys of the city of Richmond, from repairing, renewing and extending its said poles, wires, lines and routes as its business may require may be declared null and void; that your orator may have such other, further, general and complete relief as may be agreeable to equity and the nature of its case; and also that a writ of subpœna issue out of and under the seal of this honorable court directed to the said defendant, The City of Richmond, commanding it upon a certain date therein named, to be and appear in this honorable court, and there to answer all and singular the premises, and to abide by and perform such order and decree as may be entered by the court in the cause.

And your orator, as in duty bound, will ever pray, &c.

THE SOUTHERN BELL TELEPHONE
AND TELEGRAPH COMPANY,
By COUNSEL.

GEO. H. FEARONS,
STILES & HOLLADAY, AND
LEAKE & CARTER,
Counsel for Plaintiffs.

STATE OF VIRGINIA, }
City of Richmond, } *To wit:*

This day personally appeared before me, a notary public in and for the city of Richmond, in the State of Virginia, C. E. McCluer, and made oath that the statements contained in the foregoing bill are true, so far as made on his own knowledge, and that he believes them to be true so far as made on information derived from others.

Given under my hand this 5th day of October, 1896.

WM. E. CRAWFORD, *N. P.*

14 "EXHIBIT A" WITH BILL.

Filed October 6, 1896.

(Copy.)

To all whom it may concern:

Be it known that the Southern Bell Telephone and Telegraph Company, a corporate body organized under the laws of the State of New York, through its duly authorized officers, whose signatures are hereunto attached, does hereby accept, without reservation, all of the restrictions and obligations of the act of Congress approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes." And the said company does especially agree that telegrams between the several departments of the Government and their officers and agents shall at all times have priority over all other business in their transmission over the lines of said company, and that the charges for such telegrams shall not exceed the rates annually fixed by the Postmaster General.

This declaration of acceptance is made in order that said Southern Bell Telephone and Telegraph Company may be entitled to the rights and privileges granted by the act of Congress aforesaid.

Done at New York city this 13th day of February, 1889.

[Seal Southern Bell Telephone & Telegraph Co.]

SOUTHERN BELL TELEPHONE
AND TELEGRAPH COMPANY,
By JNO. VAN HORN, *President.*
D. J. CARSON, *Secretary.*

POST-OFFICE DEPARTMENT,
WASHINGTON, D. C., *Feb'y 18th*, 1889.

I, Don M. Dickinson, Postmaster General of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this department.

Seal Post-office Department, United States of America.

In testimony whereof I have hereunto set my hand and caused the seal of the Post-office Department to be affixed, at the city of Washington, the day and year above written.

DON M. DICKINSON,
Postmaster General.

15 "EXHIBIT B" WITH BILL.

Filed October 6th, 1896.

(Copy.)

W. E. Cutshaw, city engineer. (Received June 27, 1894.)

CITY ENGINEER'S OFFICE,
RICHMOND, VA., *June* 26, 1894.

Mr. C. E. McCluer, general manager So. Bell. Telephone Co.:

DEAR SIR: At a meeting of the committee on grounds and buildings, held on June 20th, 1894, I was directed to communicate with you and state their requirement to have your company furnish free telephone service through your regular exchange to the following offices in the city hall:

Basement.	First floor.
Fire chief's office,	Assessor's office,
Supt. charities,	Gas inspector's office,
Clerk police court,	Water works,
High constable's office,	Treasurer's office,
Board of health,	Auditor's office,
Coroner,	Collector's office,
Calder's office.	Mayor's office,
	Chief of police.

Second floor.	Third floor.
Clerk hustings court,	City engineer,
Clerk circuit court,	Council,
Clerk chancery court.	City attorney.

Fourth floor.

Fire-alarm,
School board,
Clerk law and equity court.

Also six private line 'phones between the following offices: Calder's room with boiler-room and engine-room, all in basement; water work's office on first floor with messenger's room in basement, and fire-alarm office on fourth floor with battery-room in basement.

Please arrange to put these 'phones in operation at the earliest day practicable.

Very truly,
(Signed) W. E. CUTSHAW,
City Engineer.

(Answered June 28, 1894.)
(D. J. C., July 5, 1894.)

16 "EXHIBIT C" WITH BILL.

Filed October 6th, 1896.

(Copy.)

RICHMOND, VA., *November* 2, 1894.

Chairman and members of subcommittee on grounds and buildings, Richmond, Va.

GENTLEMEN: Responding to the demand of the committee on grounds and buildings for free telephone service for the new city hall offices, I am instructed by our executive officers to make the following proposition:

We will make a discount of 50 % on all municipal stations, none to be free except the mayor's residence.

We now pay to the city of Richmond a cash tax of $810. We furnish, without charge, poles for carrying city wires, valued at $1,000. We propose a discount of 50 % on all municipal stations equivalent to about $900 on the present list.

We pay also the State a tax of over $1,500 on our Richmond plant, making a total of over $4,000.

Yours respectfully,

(Signed) C. E. McCLUER,

Supt. for Southern Bell Telephone and Telg. Co.

"EXHIBIT D" WITH BILL.

Filed December 5th, 1896.

RICHMOND, VA., *November* 2, 1896.

Mr. C. E. McCluer, superintendent So Bell Telephone Co., Richmond, Va.

DEAR SIR: In addition to the number of 'phones called for in our communication dated June 26, 1894, the city of Richmond will require free telephone service as follows:

Alms-house,	Upper gas works,
Lower gas works,	1st, 2d, 3d police stations,
City jail,	City stables.
Oakwood cemetery,	

Our subcommittee will expect an answer by 5 o'clock p. m. on Monday next.

Very respectfully,

(Signed) W. E. CUTSHAW,

City Engineer.

17 "EXHIBIT E" WITH BILL.

Filed October 6th, 1896.

(Copy.)

RICHMOND, VA., *Nov.* 5, 1894.

Col. W. E. Cutshaw, city engineer, city.

DEAR SIR: With reference to your letter of November 2d in which you state that the city of Richmond requires free telephone service to nine points in addition to those stated to be required in your letter of June 26th, making altogether thirty-nine free stations, I am instructed to say that the officers of our company regret that you are unwilling to accept our proposition of the 2d inst., offering to furnish the city of Richmond telephone service as the same might be called for for municipal offices of the city of Richmond on the basis of one-half our regular schedule rates.

We are now paying the city of Richmond license and other taxes amounting to	$810 00
Our offer to furnish the city of Richmond telephones at half rate would for 30 stations amount to	900 00
Total per year	$1,710 00

Thirty-nine free stations and the taxes we are now paying would amount to $3,240 per year. This demand is greater than has been made in any city in the country, and we are reluctantly compelled to decline it.

The company has been long an applicant to the city of Richmond for the privilege of putting down a system of underground conduits for the conduct of its business, and we are still desirous of having this privilege. We are willing and anxious to meet the authorities of the city of Richmond that arrangements may be made by which the municipal offices of the city of Richmond shall have facilities for the proper conduct of its business. Is it too much to ask that the obligation of the company to the city for telephone service shall be kept within reasonable limits, and that the company shall be authorized and enabled to make its construction and repairs in a manner to meet the requirements of the public and of the business? In view of all this we respectfully ask that further consideration of the subject be postponed until the requirements of the city for municipal service and the needs of the company can be fairly considered.

Yours respectfully,

(Signed) C. E. McCLUER, *Supt.*

18 "EXHIBIT F" WITH BILL.

Filed October 6th, 1896.

(Copy.)

An Ordinance

(Approved December 14, 1894.)

Repealing an ordinance approved June 26, 1884, concerning the Southern Bell Telephone and Telegraph Co.

Be it ordained by the council of the city of Richmond—

That the ordinance approved June 26, 1884, granting the right of way throughout the city to the Southern Bell Telephone and Telegraph Company be, and the same is hereby, repealed.

2. That in accordance with the fifth section of said ordinance all privileges and rights granted by said ordinance shall cease and be determined at the expiration of twelve months from the approval of this ordinance by the mayor.

"EXHIBIT G" WITH BILL.

An Ordinance.

Filed October 6th, 1896.

As to the joint use of poles erected in the streets and alleys of the city of Richmond for the support of wires used in connection with the transmission of electricity.

(Approved September 10, 1895.)

Be it ordained by the council of the city of Richmond—

1. That all poles now erected in the streets or alleys of the city of Richmond, for the support of wires used in connection with the transmission of electricity, except such as support wires required by the city ordinances, to be removed and run in conduits, shall hereafter be allowed to remain only upon the terms and conditions hereinafter set forth.

2. No pole now erected for the support of telephone wires shall remain on any street in said city after the 15th day of December, 1895, unless the owner or user of such pole shall first have
19 petitioned for and obtained the privilege of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of this ordinance, and such other conditions as the council may see fit to impose. And if such owner, failing to obtain such privilege as above required, shall neglect or fail to remove such pole or poles and telephone wires supported thereon from the streets or alleys of the city by the 20th day of December, 1895, and restore the street to a condition similar to the rest

of the street or alley contiguous thereto, the said owner shall be liable to a fine of not less than five nor more than one hundred dollars for every such pole so remaining in the street or alley; to be imposed by the police justice of the city; each day's failure to be a separate offense.

3. The committee on streets may hereafter require any person or company owning any such poles, used for telephone or telegraph purposes, to allow any other person or company to place upon its poles and in such positions thereon any telegraph, telephone, or any other light current wire which may be used for the transmission of electricity now belonging to, or that may hereafter belong to, any person or company authorized by the council to run wires in the streets or alleys as the committee may, from time to time, deem proper, and which will not, in the opinion of said committee, unreasonably interfere with the business of the person or company owning such poles, and upon such terms and conditions as may be agreed upon by the said owner and any person or company desiring to use such poles; and in the event that said owner and the person or company desiring to use said poles cannot agree upon satisfactory terms and conditions, the same shall be settled by three disinterested persons—one to be selected by such owner, one by the person or company desiring the use of said poles, and the third by the two persons so selected; and the terms and conditions which shall be fixed and determined by said persons, or a majority of them, shall be the terms and conditions upon which said company or companies, respectively, shall use and occupy said poles. If the said owner shall, for thirty days after having been requested in writing to appoint its representative, fail to make such appointment, then the city engineer shall make such appointment, and the person so appointed shall have the powers he would have had if he had been appointed by the said company. If the two arbitrators, selected in either of the two manners above specified, shall fail for thirty days after their appointment to select the third arbitrator, then the city engineer shall select such third arbitrator, and when so selected he shall have the same powers he would have had if he had been appointed by the said two arbitrators. Or if, after the three arbitrators shall have been appointed in any of the modes above specified, they shall fail to settle and determine said terms and conditions within thirty days from the date of the appointment of said third arbitrator, then the city engineer shall have power to select a person who shall have power to settle and determine said terms and conditions. Should either the said owner or any person or company that may under this section enter upon and use the poles of the said owner, fail to keep and perform each and every one of the terms as to the use of said poles, the company so failing shall be liable to a fine of not less than ten nor more than one hundred dollars for such failure; each day's failure to be a separate offence. The said committee shall have the power to require said owner to allow any person or company desiring to enter upon and use said poles to so enter and use the same, under such conditions as the city engineer may prescribe, as soon as the said person

or company so desiring to enter shall have appointed its arbitrator; but the person or company so entering shall do so under contract and bond that he or it will abide by and conform to the terms and conditions determined upon by the arbitrators, as soon as such decision shall be announced. And the said committee shall have power also to require, from time to time, the said owner, or any other person or company using said poles, to afford and furnish such protection or protections to all wires on such poles as the said committee may deem proper or necessary in order to allow such wires to perform the purposes or functions for which they were intended. All work as to placing of wires now upon the poles of any other company shall be done at the cost and expense of the party desiring to use such poles. Each and every one of the above-stated provisions shall respectively apply to poles now carrying electric light, electric power and electric car wires, to the extent of entitling any person or company, authorized by the council to run wires over the streets and alleys and authorized by said committee, in accordance with the terms of this ordinance, to place on any such pole any electric light, electric power, electric car wires, or other heavy current wires which may be used for the transmission of electricity. For any failure to perform any requirement ordered under this section within ten days after being notified of such requirement by the city engineer, each party so in default shall be liable to a fine of not less than fifty nor more than five hundred dollars; each day's failure to be a separate offence.

21 4. Hereafter no pole shall be erected until the city engineer shall have first determined upon the size, quality, character, number, location, condition, appearance and manner of erection of such poles.

5. Each and every permission herein given is granted under the condition that the city shall have the right by and through the board of fire commissioners to run all wires needed for the fire-alarm and police telegraph department on all poles erected or allowed under this ordinance to remain on any street or alley of the city, and in such positions on said poles as shall seem proper to the superintendent of said department. Whenever any permission has been granted by the council or the street committee to any person or corporation to erect any pole or poles for the support of wires used for the transmission of electricity, it shall be the duty of such person or corporation, before erecting any such pole or poles, to submit to the board of fire commissioners a diagram showing the proposed location of such poles and arrangement of poles and wires, so as to enable said superintendent to select and require to be reserved such positions on any such pole or poles as he may deem proper and necessary.

6. No person or company shall use the poles, wires or other apparatus, above referred to, of any other person or company until he or it shall have filed with the city engineer a written application, fully setting forth what poles or other apparatus he or it shall desire to use, nor until receiving from said engineer a written notification that the said committee has given the applicant permission

to so use the same in accordance with the provision of this ordinance.

7. The city council hereby reserves the right to put at any time other restrictions and regulations as to the erection and use of said poles, wires, and other apparatus used in connection with transmission of electricity, and from time to time require such poles as it may deem proper to be removed, and the wires thereon to be run in conduits upon such terms as the city may deem proper.

8. All persons and corporations having, using or maintaining any telegraph, telephone, electric light or other poles in any of the parks, streets, lanes or alleys of the city of Richmond, shall annually, between the fifteenth day of December and the first day of January, in each and every year, file with the city engineer, a list of all such poles so used, possessed or maintained by him or them, giving the accurate locations of each of such poles, and of the number and character of wires carried thereon, the names of the owners of said poles and of the persons using the same, and shall at all times keep stamped, painted or printed thereon, in legible characters, their name as owner upon each of such poles. A copy of such list shall be furnished by said engineer to the city auditor and to the superintendent of fire-alarm and police telegraph.

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9. Annually, between the first day of January and the fifteenth day of January, all persons or corporations shall pay to the city treasurer a fee of two dollars for each and every telegraph, telephone, electric light or other pole used, possessed or maintained by them in any of the parks, streets, lanes or alleys of the city of Richmond, except trolley poles, used exclusively for stringing thereon wires for use in the propulsion, by electricity, of street passenger cars. Upon the receipt of the above fee by said treasurer, the city auditor shall deliver to the person or corporation paying the same a tin plate, with a plain and conspicuous number thereon, to be provided in the manner prescribed in the next succeeding section, for each and every pole upon which the said license fee is paid, and shall also enter in a book, to be kept for that purpose, the name of the person or corporation to whom the license is issued, and the number of poles for which it is issued, and the number of tin plates delivered to the person paying such license fee; he shall also deliver to such person or corporation a certificate, under his own hand, that such person or corporation has paid the required license fee for that year on the specified number of poles, and has received the tin plates of the given numbers therefor; such person or corporation shall then have one of such tin plates securely fastened, in some conspicuous place, upon each of the poles used, possessed or maintained by it or him, as may be designated by said superintendent.

10. It shall be the duty of the city auditor, annually, on or before the fifteenth day of January in each and every year, to purchase a sufficient number of tin plates, numbered with plain, conspicuous figures, beginning with number one, and so on progressively, to be furnished, as prescribed in the preceding section of this ordinance,

to the persons or corporations using, possessing or maintaining telegraph, telephone, electric light, or other poles other than trolley poles, used exclusively for stringing wires thereon for use in the propulsion, by electricity, of street passenger cars. The city auditor shall cause to be stamped with a proper die, or painted on each of such tin plates, the year in which they are issued, the said plates to be of suitable size and description, in the discretion of the city auditor.

23 11. After the 20th day of January, 1896, all telegraph, telephone, electric light and other poles in any of the streets, lanes and alleys of the city of Richmond (except troll-y poles used exclusively for stringing thereon wires for use in the propulsion of street passenger cars), which shall have not been included in any list filed in accordance with the eighth section of this ordinance with the city engineer, or upon which the name of the owner is not legibly painted, printed or stamped, or upon which the above-mentioned license fee has not been paid, or on which the above-prescribed tin plate is not securely fastened in some conspicuous place, shall be forthwith removed by its owner.

12. Any person or persons, or corporation, using, possessing or maintaining any telegraph, telephone, electric light, or other poles, in any of the streets, lanes and alleys of the city of Richmond, who shall fail to file with the city engineer the list as prescribed in section 8 of this ordinance, or who shall fail to have stamped, printed or painted in legible characters his or its name as owner upon each of such poles as prescribed in said section 8 by the 20th of January of each and every year, or who, if belonging to the classes required to pay a fee of two dollars on each pole, by section 8, shall fail to pay the said fee, or shall fail to have the tin plate therein prescribed securely fastened in some conspicuous place by the said 20th day of January of each and every year; upon all such telegraph, telephone, electric light or other poles so used, possessed or maintained by him or them, shall be liable to a fine of not less than five nor more than one hundred dollars for each pole upon which he, they or it are so in default; and each day of default to be a separate offence. Such fines to be imposed by the police justice of Richmond.

13. It shall be the duty of the chief of police to require the police captains of each police district to report to him, on the last Monday in November of each year, that they have had examined each pole in their respective districts used for the support of wires carrying electricity, and whether any or all are in a safe condition. The said chief of police shall, upon receipt of such reports, forward the same to the superintendent of fire-alarm and police telegraph, who shall require the person or company owning any such pole reported to be unsafe, and deemed by the said superintendent to be unsafe, to remove the same. Any such person or company, who, after being so notified, shall fail to have the same removed within forty-

24 eight hours after being so notified, shall be liable to a fine of not less than ten nor more than fifty dollars; each day's failure as to each pole so declared unsafe shall be a separate offence.

14. The chief of the fire department and the superintendent of fire-alarm and police telegraph shall each have power, and it shall be their duty, to examine and inspect from time so time all poles and every wire or cable over the streets, public grounds or buildings when such wire is designated to carry an electric current; shall notify the person or corporation owning or using such poles, when any such pole is unsafe, or owning or operating any such wire or cable whenever its attachments, insulation, supports or appliances, are unsuitable or unsafe, and that the said poles, wires or cables must be properly replaced, renewed, altered or constructed, and shall require the owner of any wire abandoned for use to remove the same. Any person or company failing to perform any requirement made of him or it by either the said chief of fire department or said superintendent, under this section, shall be liable to a fine of not less than five nor more than one hundred dollars; each day's failure to be a separate offence.

15. Any person or corporation who now has permission from the city council to run wires over the streets or alleys in the city, or may hereafter obtain such permission, may obtain additional routes for its wires when his or its business shall demand the same, and when the said committee shall authorize such additional routes subject to the conditions, restrictions, limitations and charges herein set forth.

16. All wires shall be fastened upon poles or other fixtures with glass, porcelain or rubber insulators approved by the superintendent of fire-alarm and police telegraph, and must be stretched tightly and fastened with a tie of the same kind of wire. No wires shall be stretched within four inches of any pole, building or other object without being attached to it and insulated therefrom. All wires strung on house tops must be at least nine feet clear of roof.

17. No wire shall be within twenty-five feet of the pavement at the lowest point of sag between supports, except where required to reach a lamp or other connection, and must then be protected by extra covering, and be rigidly fixed and out of the way. No wire shall be run within eighteen inches of a city wire. No tree shall be cut or disturbed without consent of the city engineer.

25 18. All electric light and power conductors, except trolley wires, shall be secured to insulated fastenings, and covered with an insulation which is waterproof on the outside and not easily worn by abrasion. Whenever the insulation becomes impaired it must be renewed immediately. All joints must be as well insulated as a conductor, and the insulation of joints must be maintained.

19. Every wire or cable must be distinguished by a number plainly marked on each cross-arm under the insulator. Day circuits must be conspicuously designated. All arc lamps must be so placed as to leave at least a space underneath of at least nine feet clear between lamp and sidewalk. Every line for arc light or power entering a building shall be controlled by a cut-off placed near the entrace, in sight and easily accessible.

20. In the construction of lines the insulation to be used must be approved by the superintendent of fire-alarm and police telegraph in writing, filed with the board of fire commissioners, and the in-

sulation resistance must be maintained in accordance with the standard to be not less than three megohms per mile per 100 volts. And under no circumstances shall underwriters' wire be used.

21. All connections with lines of electric light or power conductors shall be made at right angles to the same; and connections to buildings shall be straight across to the building, and then down the front of the building. The insulation must be preserved throughout the entire circuit, and if any portion of a lamp or fixture is a part of a circuit and can be touched, it must be insulated. All conductors shall have a resistance uniformyly distributed of not more than thirty ohms per mile per ampere, and proportionately less for heavier currents.

22. All circuits for electric light or power must be tested every hour, and when a ground comes on effort must be made to remove it at once. Failing in this, the circuit must be discontinued until the insulation is restored. No unused loops for electric light circuit shall be allowed to remain after lamps have been taken away, except in cases where it is positively known that the lamp would be required again within three months, and where there is no underground current for that class of circuits. When allowed to remain, the joint in the loop must be as well insulated as the line itself.

26 23. Nothing is this ordinance is intended to relieve any person or company of any condition, restriction or requirement imposed upon said person or company by the ordinance in which it has been authorized to place in said streets or alleys any poles, wires or other apparatus for the transmission of electricity.

(35) 24. Each and every provision of this ordinance, unless otherwise provided, shall apply to any pole, wire or other apparatus used in connection with the transmission of electricity hereafter erected in said streets or alleys, whether the same be erected by way of repairs or for additional routes or for any other purpose.

25. Any person violating any restriction, provision, or condition imposed by this ordinance, or failing to perform any requirement made under the ordinance by the city engineer, the superintendent of fire-alarm and police telegraph department, or chief of the fire department, as to which there is not in this ordinance a fine specifically imposed, shall be liable to a fine of not less than ten, nor more than five hundred dollars, to be imposed by the police justice of said city; each day's violation or failure to be a separate offence.

This ordinance shall be in force from the 15th day of December, 1895.

EXHIBIT "H" WITH BILL.

Filed October 6th, 1896.

(Copy.)

An Ordinance

(Approved September 10, 1895.)

To require the removal of poles and wires from overhead in certain streets, and for the construction and using of conduits in certain streets.

1. The telegraph, telephone and electric light and power wires and cables, including feed (but excluding trolley wires), and all other appliances for conducting electricity, and the poles therefor, heretofore*fore* and now being in any street, alley, or public ground of the city, are hereby ordered to be removed from the following-named streets—to wit: On Broad street from the western side of Adams street to the east side of Eleventh street; on Bank street from western side of Ninth street to the eastern side of Twelfth
27 street; on Main and Cary streets from western side of Seventh street to eastern side of Fourteenth street; on Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, and Fourteenth streets from northern side of Broad street to southern side of Cary street, within twelve months from the 15th day of June, 1895. Any company, corporation, partnership, or individual, owning or controlling any such overhead wires, cables, or appliances or poles, that refuses, neglects, or fails to remove them from overhead within the time, as hereinbefore provided, shall be liable to a fine of not less than $100 nor more than $500 for each pole so remaining, to be imposed by the police justice of the city of Richmond; and for every week of continued failure and neglect to so remove them after the imposition of the fine above mentioned, such company, corporation, partnership, or individual shall be liable to a fine of not less than $100 nor more than $500, to be imposed as above stated.

2. The city council will grant permission to any company, corporation, partnership or individual to place its wires and electrical conductors in conduits under the surface of the said streets of the city; any such individual, partnership, corporation or company desiring such permission shall petition to the council therefor; such petition shall name the streets, alleys, and the side and portions thereof to be used and occupied by such conduits, and shall submit maps, plans and details thereof to accompany such petition. Such permission shall be granted by the city council upon the conditions that the petitioner shall furnish a bond to the city, to be approved by the mayor, and the penalty to be prescribed by such permission; that the pavement of the streets and alleys wherein such conduits are laid shall be properly replaced, and shall be kept in proper repair to the satisfaction of the city engineer; and that the city shall

be saved harmless from any and all damages arising from laying such conduits; that such conduits shall be of sufficient capacity to accommodate the wires in such streets and alleys, and to provide for an increase thereof to, at least, the extent of 100 per cent.; such increase of space is not to be occupied by any such company, corporation, partnership or individual, directly or indirectly, without the consent of the city council; that the wires of the city shall be carried in such conduits free of charge, and at least one duct shall be reserved for such wires; after obtaining the consent of the city council, any other person or corporation now having wires in said street, or hereafter desiring to run wires therein, may occupy
28 proper and necessary portions of such conduits upon such terms as may be agreed upon with the petitioner, and, in case of a disagreement, upon terms to be determined by arbitration as herewith provided; any such company, corporation, partnership or individual so placing its wires underground in any street, alley, or public ground of said city, shall, upon notice from the city or any of its departments, that a local improvement or gas sewer or water main, or branch thereof, is to be constructed or repaired in such manner as will necessitate the moving or altering of its conduit or conduits or their appurtenances of said individual, partnership, company, or corporation, move or alter the same at its own expense, so as to permit the construction of the improvement where ordered, and should any company or corporation omit to comply with such notice, the conduit or conduits, or their appurtenances, may be altered or moved by the city, and the cost and expense thereof recovered from such individual, company, or corporation. Manholes shall at all times conform to the grades of the streets. The location, size, shape, and subdivision of such conduits, and the material of which they shall be made and manner of construction, shall be satisfactory to the committee on streets. The work of laying underground conduits, tubes, pipes, electrical conductors, cables and wires, shall be under the direction and to the satisfaction of the superintendent of fire-alarm and police telegraph, who at all times shall have free and unobstructed access to the conduits, tubes, pipes, electrical conductors or cables, for the purpose of inspecting the same or making connection therewith for conduit wires or conductors in use or to be used by the city.

3. Wherever any wire or cable run in such conduit shall come out of such conduit for the purpose of being continued and run overhead upon poles, all precautions which may be required from time to time by the committee on streets shall be taken for the protection and safety of all persons and property.

4. The terms upon which any person or company, after obtaining permission from the city council, may enter with its wires and use such conduits shall be as follows: In the event that said owner and the person or company desiring to use said conduit cannot agree upon satisfactory terms and conditions, the same shall be settled by three disinterested persons, one to be selected by such owner, one by the person or company desiring the use of said conduit, and the third by the two persons so selected; and the terms and conditions

which shall be fixed and determined by said persons, or a
29 majority of them, shall be the terms and conditions upon which said company or companies, respectively, shall use and occupy said conduit. If the said owner shall, for thirty days after having been requested in writing to appoint its representatives, fail to make such appointment, then the city engineer shall make such appointment, and the person so appointed shall have the powers he would have had if he had been appointed by the said company. If the two arbitrators, selected in either of the two manners above specified, shall fail for thirty days after their appointment to select the third arbitrator, then the city engineer shall select such third arbitrator, and when so selected he shall have the powers he would have had if he had been appointed by the said two arbitrators. Or, if after the three arbitrators shall have been appointed in any of the modes above specified, they shall fail to settle and determine said terms and conditions within thirty days from the date of the appointment of said third arbitrator, then the city engineer shall have the power to select a person who shall have power to settle and determine said terms and conditions. Should either the said owner or any person or company that may, under this section, enter upon and use the conduit of the said owner, fail to keep and perform each and every one of the terms as to the use of said conduit, the company or person so failing shall be liable to a fine of not less than fifty, nor more than five hundred, dollars for such failure; each failure to be a separate offence. The said committee shall have the power to require said owner to allow any person or committee desiring to enter upon and use said conduit to so enter and use the same, under such conditions as the city engineer may prescribe, as soon as the said person or company so desiring to enter shall have appointed its arbitrator; but the person or company so desiring to enter shall do so under contract and bond that he or it will abide by and conform to the terms and conditions determined upon by the arbitrators, as soon as such decision shall be announced. And the said committee shall have power also to require from time to time the said owner, or any other person or company using said conduit, to afford and furnish such protection or protections to all wires in such conduit as the committee may deem proper and necessary in order to allow such wires to perform the purposes or functions for which they were intended. For any failure to perform any requirement ordered under this section, within ten days after being notified of such requirement by the city engineer, each party so in default shall be liable to a fine of not less than fifty, nor more than five hundred, dollars; each day's failure to be a separate offence.

30 5. No privilege as to the building and owning of said conduits shall last longer than fifteen years, at the expiration of which time the city may put such other restrictions, conditions and charges as it may see fit, and shall be lawful, or may order its removal at the expense of the owner.

6. For the privilege of using and occupying the streets of the city as herein proposed, each person or corporation owning or using any

wire or wires run in such conduit shall each year, until January 1st, 1900, pay to the city treasurer a sum equal to $2.00 per wire per mile so owned or used by said person or company. On or after January 1st, 1900, the city council reserves the right to charge such larger compensation for the rest of the term of the privilege as it may see fit. Each person or corporation shall, on the 15th day of June and January of each year, pay to the city auditor a sum equal to $1.00 per wire per mile then owned or used by such person or corporation, and shall render to the auditor a sworn statement as to the number and length of each of the wires then owned or used by him or it. The committee on finance may, when it may see fit, have the books of the person or corporation rendering such statement examined by a book-keeper employed by said committee to ascertain whether such statement is accurate. For failure to allow such examination, whenever requested by the finance committee, the person or corporation owning any wires in such conduits shall be liable to a fine of not less than one hundred nor more than five hundred dollars for each wire of said person or company admitted or proven to be in such conduit; and for failure to pay such semi-annual compensation upon the days above specified, the person or company shall be liable to a fine of not less than ten nor more than five hundred dollars; each day's failure to be a separate offence.

7. The conduits herein required shall be extended from time to time, whenever required by the city council, to cover streets or alleys upon which the council may determine from time to time that no overhead wires shall be run.

This ordinance to be in force from the 15th day of June, 1896.

31 "EXHIBIT K" WITH BILL.

Filed October 6th, 1896.

(Copy.)

Ordinance

Granting the right of way throughout the city to the Southern Bell Telephone and Telegraph Company.

1. Permission is hereby granted the Southern Bell Telephone and Telegraph Company to erect poles and run suitable wires thereon, for the purpose of telephonic communication throughout the city of Richmond, on the public streets thereof, on such routes as may be specified and agreed on by a resolution or resolutions of the committee on streets, from time to time, and upon the conditions and under the provisions of this ordinance.

2. On any route conceded by the committee on streets, and accepted by the company, the said company shall, under the direction of the city engineer, so place its poles and wires as to allow for the use of the said poles by the fire-alarm and police telegraph, in all cases giving the choice of position to the city's wires, wherever it

shall be deemed advisable by the council or the proper committee to extend the fire-alarm and police telegraph over such route.

3. The telephone company to furnish telephone exchange service to the city at a special reduction of ten dollars per annum for each municipal station.

4. No shade trees shall be disturbed, cut or damaged by the said company in the prosecution of the work hereby authorized without the permission of the city engineer and consent of the owners of property in front of which such trees may stand, first had and obtained; and all work authorized by this ordinance shall be, in every respect, subject to the city engineer's supervision and control.

5. The ordinance may at any time be repealed by the council of the city of Richmond; such repeal to take effect twelve months after the ordinance of resolution repealing it becomes a law.

32

Injunction.

Entered Oct. 6, 1896.

In the Circuit Court of the United States for the Eastern District of Virginia.

SOUTHERN BELL TELEPHONE AND TELEGRAPH CO., Plaintiff,
vs.
CITY OF RICHMOND, Defendant. } In Equity.

On reading the bill and exhibits of the plaintiff, the court doth restrain and enjoin the defendant, The City of Richmond, its agents, employees and all others from cutting, removing, injuring or in any way interfering with the poles, wires, instruments and business of the plaintiff in said city along and over the routes in said city now used by it, from interfering in any way with the proper use, maintenance and repairs of said poles, wires and instruments of said plaintiff, and from taking proceedings to impose fines or penalties on said plaintiff for using, maintaining and keeping in repair its said poles, wires and implements until the further order of the court, but leave is given the defendant upon ten days' notice to move to vacate this temporary restraining order, and it is required to show cause before this court at its court-room in the city of Richmond, Va., on the 17th day of November, 1896, why the injunction herein should not be made perpetual, and such further injunction awarded as is prayed for in the bill in this case. But this injunction is not to be effectual until the plaintiff or some one for it shall enter into bond in the penalty of $1,000 to be approved by one of the judges of this court, conditioned to pay all such costs and damages as may be awarded the defendant should this injunction be dissolved; and thereupon came the Virginia Trust Company, by A. L. Holladay, its attorney-in-fact, and executed the above-required bond, which bond was approved by the judge granting this injunction.

NATHAN GOFF,
U. S. Circuit Judge.

October 6, 1896.

33 *Demurrer to Bill.*

Filed November 16th, 1896.

In the Circuit Court of the United States for the Eastern District of Virginia.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY
vs.
CITY OF RICHMOND.

The demurrer of the above-named defendant, City of Richmond, to the bill of complaint of the above-named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner or form as the same are therein set forth and alleged, doth demur to the said bill, and saith that the same is not sufficient in law, and for causes of demurrer showeth:

1st. That it appeareth by the plaintiff's own showing by the said bill that it is not entitled to the relief prayed for by the said bill against this defendant.

2nd. That the act of Congress, entitled "An act to aid in the construction of the telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," approved July 24, 1866, and claimed in said bill as furnishing protection to said complainant against respondent does not apply to the said complainant, and only applies to telegraph companies.

3rd. That said act of Congress, approved July 24, 1866, if it shall apply at all to the complainant, does not give it any right to erect its poles and run its wires along the streets of the respondent without the consent of the respondent, subject to reasonable regulations as to the routes, position and number of the poles and pay for the use of its streets.

4th. That if said act of Congress, approved July 24, 1866, puts the said complainant as free of the control of the respondent as is claimed in said bill of complaint, the said act is unconstitutional and void.

5th. That notwithstanding the power of Congress in matters of interstate commerce, and notwithstanding the enactment of said act of Congress, approved July 24, 1866, the complainant had no right to erect its poles and run its wires along the streets of the respondent without the consent of the said respondent, and upon such
34 reasonable terms as to the routes, position and number of poles and pay for the use of the said streets as the said respondent might impose.

6th. That the manner of determining as to the routes of the poles and wires of said complainant and the compensation to be paid the city, was agreed upon in the ordinance of said respondent and cited in said bill of complaint, as approved June 26th, 1884,

upon condition that the city should reserve the right to require the complainant to remove said poles and wires after the expiration of twelve months, alluded to in said ordinance.

7th. That the poles and wires of the complainant, as appears from said bill of complaint, were erected under an agreement contained in the ordinance of said respondent, and cited in said bill of complainant as approved June 26, 1884, and that the respondent in passing the ordinance, approved December 14, 1894, and referred to in said bill of complaint as requiring the complainant to remove its poles and wires, merely exercised the power rightfully reserved in said ordinance approved June 26, 1884.

8th. That under the statute of Virginia, referred to in said bill of complaint, the respondent was given authority to reserve the power of revocation contained in the said ordinance mentioned in said bill as approved June 26, 1884.

9th. The power of revocation reserved in said ordinance approved June 26, 1884, has been properly exercised in the ordinance cited in said bill as approved December 14, 1894.

Wherefore and for divers other and good causes of demurrer appearing on said bill, this defendant doth demur thereto.

And it prays the judgment of this honorable court, whether it shall be compelled to made any answer to the said bill, and it may humbly pray to be hence dismissed with its reasonable costs in this behalf sustained.

CITY OF RICHMOND,
By COUNSEL.

C. V. MEREDITH.

I certify that the foregoing demurrer is, in my opinion, well founded in point of law.

C. V. MEREDITH,
Counsel for City of Richmond.

35 STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

Richard M. Taylor, being duly sworn, deposeth and says: I am the mayor of The City of Richmond, the above-named defendant. The foregoing demurrer is not interposed for delay.

W. P. LAWTON,
Notary Public.

Order Filing Demurrer and Setting Demurrer Down for Argument.

Entered Jan. 14th, 1897.

SOUTHERN BELL TELEPHONE AND TELEGRAPH CO., Complainant,
vs.
CITY OF RICHMOND.

This cause came on to be heard on the demurrer heretofore deposited with the clerk, and which is now filed by leave of the court,

which demurrer was, on motion of the complainant, set down for argument, *and* the hearing of this case on the temporary restraining order having been adjourned to this day by consent of parties without waiving or effecting any rights of either party.

NATHAN GOFF,
U. S. Circuit Judge.

Opinion Overruling Demurrer.

Filed February 24th, 1897.

In the Circuit Court of the United States for the Eastern District of Virginia.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY
vs.
THE CITY OF RICHMOND.
} In Equity.

GOFF, *Circuit Judge:*

This case is now in my hands for hearing upon the bill of complaint and the demurrer thereto. The demurrer admits the allegations of the bill properly pleaded. Bearing this in mind we will have but little trouble in reaching a conclusion on the questions now to be disposed of. The allegations in the bill claimed by defendant to be legal conclusions—from the facts and circum-
36 stances set forth—will not be considered as admitted by the demurrer unless such facts and circumstances are found to clearly sustain the contention of complainant.

The complainant is a corporation duly organized and doing business under the laws of the State — New York, and the defendant is a municipal corporation existing under the laws of the State of Virginia. The complainant is engaged in the business of a telephone company, in, through and between the States of Virginia, West Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida, and has been so engaged for the past fifteen years. It has, in conducting its business, erected and maintained lines of wires and poles through and along certain of the streets and alleys of the city of Richmond, under and by authority of the common council and board of aldermen of said city, and by virtue of the laws of the State of Virginia and of the United States.

It is alleged that the complainant is a telegraph company, under the laws of the United States and of the State of Virginia, and that it was chartered as such under the general laws of the State of New York, relating to telegraph companies. It is set forth in the bill that complainant in the city of Richmond maintains a telephone office, connected by wires with a large number of subscribers, all of whom are connected with the office of the Western Union Telegraph Company in that city, and that all such subscribers may, and many of them do, transmit through their instrument connected with said wires, and through such office of complainant, to the

Western Union Telegraph Company, messages addressed and intended to be sent, and which are sent to points in other States, the District of Columbia and foreign countries, under an agreement which has existed for years between the complainant and said Western Union Telegraph Company.

Complainant also claims that its wires, poles and instruments as located and used along and over the streets of the city of Richmond, are so located and used under the provisions of, and are protected by the laws of the United States, for the reason that on the 13th of February, 1889, it duly filed with the Postmaster General of the United States its acceptance of the terms of the act of Congress, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," approved July 24th, 1866, by which it was, among other things, provided that any telegraph company then formed, or thereafter organized, under the laws of any State, which would file a written acceptance with the Postmaster
37 General of the restrictions and obligations of said act, should have the right to conduct, maintain and operate lines of telegraph over and along any of the military roads and post-roads of the United States which had then been or might thereafter be, declared such by law.

It is also alleged that the city of Richmond, on the 26th of June, 1884, in pursuance of the power given it by section 1288 of the Code of Virginia, passed an ordinance by which the complainant was granted permission to erect poles and run wires thereon for the purpose of telephonic communication throughout the city of Richmond, on the public streets thereof, on such routes as might be specified and agreed upon by resolutions of the committee on streets from time to time, and upon the conditions and under provisions of such ordinance.

It is also alleged that the city of Richmond, on the 14th of December, 1894, passed an ordinance, which provided "that the ordinance, approved June 26th, 1884, granting the right of way throughout the city to the Southern Bell Telephone and Telegraph Company, be and the same is hereby repealed;" that, by the 5th section of said ordinance of December 14th, 1894, all the privileges and rights granted by the ordinance of June 26, 1884, *was* to cease at the expiration of twelve months from the approval of said repealing ordinance.

Other allegations in the bill set forth, it will not be necessary to consider in disposing of the question now before me.

The defendant insists that the act of Congress, before mentioned, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes," does not apply to the complainant; and that, therefore, the claim made in the bill that the complainant is entitled to the rights and benefits secured thereby is without merit. The insistance is that the complainant is a telephone company, and that said act of Congress only embraces telegraph companies.

A number of courts, the decisions of which are worthy of our

serious consideration, if not binding authority upon us, have held that a telephone company is a telegraph company, and that a company authorized to construct and operate telegraphs was empowered to establish a telephone service.

On this question, see *Attorney General vs. Telephone Co.*, 6 Q. B. Div., 244; *Telephone Company vs. City of Oshkosh*, 62 Wis., 3; 21 N. W. Rep., 828; *Cumberland Telephone & Telegraph Co. vs.*
38 *United Electric Railway Co.*, 42 Fed., 273; *Duke vs. Central New Jersey Telephone Company*, 53 New Jersey Law Reports, 341; *Chesapeake & Potomac Telegraph Co. vs. Baltimore & Ohio Telegraph Co.*, 66 Md., 410. In this case this contention is confidently made by counsel for complainant, and vigorously denied by the attorney for the city of Richmond. I do not find it necessary now to decide it, for the reason that, in my judgment, the statements set out in the bill, and admitted by the demurrer to be true, show that the complainant is both a telephone and telegraph company, and clearly entitled, if the proper action relating thereto has been taken, to claim the benefits and protection given by said act of Congress. It is distinctly charged, not only that the complainant is a telephone company, engaged in such business in a number of the States of the Union, but, also, that it is a telegraph company, chartered as such, under the general laws of the State of New York. That being so, then the provisions of the act of Congress mentioned are applicable, and whatever action may be found proper hereafter, when all the facts are before the court, I hold that, so far as the demurrer is concerned, *that* this insistance of the defendant is without merit.

The defendant also claimed, in its written demurrer filed in this cause, that if said act of Congress was intended to give to a telegraph company the right to erect poles and run wires along the streets of the city of Richmond, without the consent of said city, that such legislation was unconstitutional and void. This position was abandoned in the argument, and it was conceded that such act was constitutional; that all streets of the city of Richmond, which are letter-carrier routes, are post-roads within the meaning of said act, and that under the same a telegraph company can obtain a right of way for its poles and wires through and along the streets of a city without the consent of a municipality. These admissions are based on the decisions of the Supreme Court of the United States. *Pensacola Tel. Co. vs. Western Union Tel. Co.*, 96 U. S., 1; *Telegraph Co. vs. Texas*, 105 U. S., 460; *Western Union Tel. Co. vs. Massachusetts*, 125 U. S., 530; *St. Louis vs. Western Union Tel. Co.*, 148 U. S., 92, and 149 U. S., 465.

I think it is plain that the complainant, under the allegations in the bill contained, is a corporation entitled to exercise all the functions granted to telegraph companies under the laws of the State of New York, and that under the act of Congress referred to it has the privilege of running its lines through and over the streets of the city of Richmond that are post-roads of the United States, and that said city has no lawful right to prevent it from so doing

39 While it is true that telegraph companies, claiming the right under the laws of the United States to enter the terri-

tory of a State and erect its poles and lines therein, must pay their due proportion of taxes and submit to the ordinary and reasonable regulations of the State and municipal authorities, whose highways they use and whose protection they claim and receive, still it is also true that neither the State nor the municipal authorities can prohibit them from entering their respective jurisdictions, nor require them to remove therefrom after they have established their lines.

Such companies must submit to proper and reasonable local regulations, but they will not be expected to acquiesce in a city ordinance not intended to regulate its management, but passed for the purpose of destroying its existence.

I think the bill alleges such facts as show the complainant to be engaged in interstate commerce, and I find that the claim of defendant that the business of the complainant company is purely local in character is not sustained. The case made by the pleadings is, as I have indicated; what the result may be when the evidence is in, is yet to be found.

The defendant also insists that if the complainant erected its poles and lines under the authority of the ordinance of the city of Richmond passed June 26, 1884, that it cannot afterwards, by accepting the provision of the act of Congress of July 24, 1866 (14 Stat., 221; Rev. Stat., sec. 5263 *et seq.*), thereby render of no effect the stipulations contained in said city ordinance. To what extent the complainant is bound by the terms of the ordinance of June 26th, 1884, it is not now necessary to determine, but that it is protected by the act of Congress referred to—by virtue of its acceptance of the restrictions and obligations of the same, which was filed with the Postmaster General of the United States on the 13th day of February, 1889—and that it may rely upon it for the purpose of preventing its poles and lines from being removed, and its property destroyed is, I think, under the circumstances set forth in this bill, so clear that there is not room for doubt.

Said act of Congress was intended to apply to telegraph companies in existence at the time it was passed, as well as those that might be organized thereafter, provided such companies accepted the terms of same in manner before mentioned. If such companies had been organized under State laws, and had been transacting business under the provisions of municipal ordinances, and then subsequently accepted the terms of said act of Congress, it follows that the State and city laws in so far, at least, as they conflicted with such national legislation, were inoperative and void, and for the reason that they concerned matters over which the Congress had supreme control by virtue of direct constitutional authority.

Holding, as I do, on the questions referred to, it becomes immaterial to further consider the matters raised by the demurrer and discussed by counsel, for the reason that, decide them as I may, still the jurisdiction of the court to hear and determine this case must be maintained.

They can be considered hereafter, if necessary, when they have been more fully presented by answer and testimony. I will pass a

decree overruling the demurrer, and giving the defendant the usual time in which to answer.

The injunction, as prayed for by complainant, will be granted, to remain in force until the further order of this court.

NATHAN GOFF,
U. S. Circuit Judge.

Order Overruling Demurrer and Continuing Injunction.

Entered March 15th, 1897.

In the Circuit Court of the United States for the Eastern District of Virginia.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY
vs.
CITY OF RICHMOND. } In Equity.

The defendant's demurrer in this case having been set down for argument and fully argued and submitted to the court on the 14th day of January, 1897, it is adjudged, ordered and decreed, for reasons stated in writing, filed in this cause and made a part of the record, that the said demurrer be, and the same is hereby, overruled. And it is further adjudged and decreed that the injunction and restraining order (dated 6th October, 1896) entered in this cause be, and the same is hereby, continued in force, and the said City of Richmond, its agents, employees and all others be restrained and enjoined, as prayed for in the plaintiff's bill in this case, from cutting, removing, injuring, or in any way interfering with the poles, wires, instruments and business of the plaintiff along and over the routes and streets in said city which are letter-carrier routes for the collection and delivery of mail, from interfering in any way with the proper use, maintenance and repairs of said poles, wires and instruments of said plaintiff, from preventing the said plaintiff
41 from repairing, renewing and maintaining its lines, poles and wires in, along and over the said routes and streets of said city for the purpose of serving existing as well as new subscribers and customers, and from taking proceedings to impose fines or penalties on said plaintiff for using, maintaining and keeping in repair its said lines, poles, wires and instruments until the further order of this court.

And the said defendant has leave, should it desire so to do, to file its answer to the bill of the plaintiff in this case within thirty days.

NATHAN GOFF,
U. S. Circuit Judge.

March 15, 1897.

Answer of Defendant.

Filed March 30, 1897.

In the Circuit Court of the United States for the Eastern District of Virginia.

SOUTHERN BELL TEL. & TEL. CO.
vs.
CITY OF RICHMOND.

The answer of the City of Richmond to a bill of complaint of the Southern Bell Telephone and Telegraph Company, in the United States circuit court for the eastern district of Virginia.

This respondent, without waiving its demurrer or the objections to the many errors and imperfections in said bill of complaint, for answer to so much of said bill of complaint as it is advised it is material for it to answer, answers and says:

That the matter in dispute exceeds the value of $20,000.

That this respondent is ignorant as to the powers given to the complainant corporation by its alleged charter, and calls for proof of the same, by the filing of a copy of said charter. It admits that said complainant has, since 1884, been maintaining and operating a telephone exchange in the city of Richmond, Virginia, with its poles erected in, and its wires running over and along certain streets and alleys of the city of Richmond for the transmission of telephonic communication between parties in said city; but it denies that the complainant erected or maintained said exchange, or any of its appurtenances, under or by any authority except by that of the council of the city of Richmond and the legislature of the
42 State of Virginia. This respondent calls for proof that any of the subscribers or patrons of said Richmond exchange are connected through said exchange with the office of the Western Union Telegraph Company. This respondent does not believe, and denies that any agreement has been, or is in force between said complainant and the Western Union Telegraph Company as to the transmission of messages to be sent outside of the State of Virginia, and your orator calls for proof of the same; your respondent also calls for proof as to any person outside of the city of Richmond sending messages to the office of said telegraph company over the wires of said complainant; and your respondent also calls for proof of the agreement as to the joint use of poles, spoken of in said bill of complaint.

Your respondent denies that the sending of messages over the wires of the complainant to be transmitted, subsequently, over the wires of the Western Union Telegraph Company to points outside of the State of Virginia is interstate commerce, and denies that such business is a necessary part of the business of the complainant.

Your respondent does not know and, therefore, does not admit as

to what is the intention of the complainant as to the extension of its business.

Your respondent denies that the wires, poles and lines of the said complainant in and over the said streets and alleys of the said city constitute a part of the postal service of the United States.

Your respondent denies that the business of the complainant is essential to the business of its subscribers for communication with their correspondents outside of the State of Virginia.

This respondent denies that the business and status of the complainant, so far as it concerns its Richmond exchange and its poles and wires on the streets and alleys of the said city, is a telegraph company; and while it may be true, but of that your respondent does not know, not admit, that the complainant was chartered as a telegraph company, it insists that as to its Richmond exchange it is not, and does no business as a telegraph company.

Respondent does not know and does not admit that the complainant ever filed with the Postmaster General of the United States its acceptance of the act of Congress as to the construction of telegraph lines, approved July 24, 1886, and calls for proof thereof. Your respondent denies that even if any such acceptance was ever filed it entitled the complainant, so far as its telephone exchange in the city of Richmond is concerned, to any of the rights and powers authorized by said act.

43 Your respondent insists that the several departments of the Government of the United States, located in the city of Richmond, which used said telephone exchange and electrical conductors only used them as any other subscriber does.

Your respondent insists that the complainant constructed and maintains its lines and poles in the alleys and streets of the city of Richmond not only under the statute of the State of Virginia, but also under the ordinances of the city of Richmond, approved June 26th, 1884, a copy of which was filed with the said bill of complaint and marked "Exhibit K."

Your respondent calls for proof of any contract to furnish telephone facilities to the office-s and agents of the Federal Government.

Your respondent denies that the complainant was ever authorized, so far as its Richmond Telephone Exchange is concerned, by the above-mentioned act of Congress to erect and maintain its poles and wires in and along the streets and alleys of said city of Richmond without its consent. And it denies and calls for proof of its ever having erected any such poles and wires in the said streets and alleys before applying to said city of Richmond so to do.

Your respondent admits having passed the ordinance approved July 18th, 1891, and referred to in said bill of complaint. A copy of said ordinance is herewith filed and marked Exhibit "C. of R. No. 1." Your respondent alleges that it was led to pass said ordinance because of the fact that the poles and wires used for the transmission of electricity in the city of Richmond had become so numerous as to seriously encumber said streets, and that it desired to lessen, as far as possible, the number of poles intended to carry said wires. Your

respondent also alleges that said complainant persistently and determinedly refused to assist this respondent, and declined to accept the provisions of said ordinance.

Your respondent admits that it was advised by its attorney that as long as the complainant held the poles under the said ordinance of June 26th, 1884, it could not be subjected to the terms of said ordinance of July 18th, 1891. And your respondent alleges that it was influenced as much by the said persistent refusal of the complainant to accept the terms of the ordinance of July 18th, 1891, as for any other reason to determine to repeal the said ordinance of June 26th, 1884. But your orator does not know of any threats having been made that the business of the complainant would be ruined. Certain it is that no such threats were authorized by
44 this respondent. It may be true that one of your respondent's committees attempted to induce the complainant to furnish it with certain free 'phones, as alleged in said bill of complaint. But your respondent repeats that no one was authorized by it to make any threats of destroying the complainant's business.

Your respondent admits the passage of the repeal ordinance of Dec. 14th, 1894, a copy of which is filed with said bill of complaint. Your respondent alleges that that ordinance was passed at that time in view of the fact it could not take effect for twelve months after its passage, as provided in said ordinance of June 26th, 1884. And your respondent proposed, through its counsel, before lapse of the twelve months, to pass a general ordinance regulating the use of poles and wires for telephonic purposes; and it did pass two such ordinances, which were approved September 10th, 1895, copies of each are filed with said bill of complaint. Your respondent denies that either of said ordinances imposed upon the said complainant a condition that if it filed a petition, asking to continue the use of its poles and wires, and failed to obtain said permission, that it would have to agree to remove its poles and wires from the said streets and alleys of the city of Richmond.

Your respondent denies the construction put by said bill of complaint upon its power to repeal, reserved by the ordinance of June 26th, 188[illegible], and the effect of its repeal ordinance of December 14th, 1894. Your respondent insists that by said reserved power to repeal it had the right to require, and that by said repeal ordinance it did require, that the complainant should remove from the streets and alleys of the city of Richmond all its poles and wires. Your respondent insists that it had the right to reserve said right of repeal, and that by said repeal it did not destroy any vested right; that no right became vested as against the authority which was reserved to withdraw the right.

Your respondent denies that the acceptance by the said complainant of the provisions of the above-mentioned act of Congress has rendered said complainant independent of, and superior to, the council of the city of Richmond as to the poles and wires erected under said ordinance of June 26th, 1884.

Your respondent insists that, even if the complainant be, as to its Richmond exchange, a telegraph company; yet, that having erected

its poles and wires under the contract contained in the ordinance of June 26th, 1884, it holds such privileges and rights, not by reason of said act of Congress, but under and by virtue of the terms of said contract. But your respondent denies that telephone companies and their business are embraced in said act, and also denies
45 that telephone and telegraph companies are, for the purposes embraced in this act, one and the same. And your respondent insists that the said complainant can only occupy the streets and alleys of the city of Richmond under and by consent of the legislature of the State of Virginia and the council of the city of Richmond.

Your respondent admits that it has allowed the Richmond Standard Telephone Company to erect its poles and wires; but it denies that your respondent's alleged action in requiring said complainant to remove from said streets and alleys was not on account of the interference by its poles and wires with full and proper use of said streets.

Your respondent alleges the Richmond Standard Telegraph Company has accepted the terms of the ordinance above referred to as approved September 10th, 1895; the terms of which were rejected as aforesaid by the complainant; that had the complainant accepted said terms, the poles of the Richmond Standard Company would not have been erected, but the latter company, had it still desired to enter said city, would have been required, under the terms of the last-mentioned ordinance, to have placed its wires upon the poles of the complainant. And your respondent insists that the complainant, having refused the terms of the said last-mentioned ordinances, and the said Richmond Standard Telephone Company having erected its poles mentioned in said bill of complaint, the complainant must, when it runs its wire- in the city of Richmond, place them upon the poles of the Richmond Standard Telephone Company, unless otherwise authorized by your respondent.

Your respondent alleges that it has done nothing to justify the complainant to fear that it intended to cut down its poles. It has expressed no such intention, and given no such order to any of its officers. By one of its said ordinances of September 10th, 1895, filed as Exhibit "H," with said bill of complaint, your respondent has specified the method it proposes to pursue to free its streets of the poles of the complainant or of any one else which shall be thereon without consent of your respondent's council and unlawfully, and that method is to summon the offender before one of its courts of lawful jurisdiction, and, if found guilty of so unlawfully encumbering its streets, to impose a fine. By that course of proceedure the complainant would have had full opportunity to have tested its rights under the ordinance of June 26th, 1884, through the different courts of the State of Virginia.

Your respondent denies that any of the above-mentioned ordinances were intended as a threat or menace to the rights and
46 privileges of the complainant, except so far as expressed upon their faces, and denies that they have ever intended to deter any persons from making contracts with the complainant for

the use of its 'phones, except so far as naturally results from the requirements contained in said ordinances.

And now, having fully answered, this respondent prays that the injunction heretofore granted in this case may be dissolved, and that this respondent may be dismissed with its costs in this behalf expended.

CITY OF RICHMOND,
By RICH'D M. TAYLOR, *Mayor.*

C. V. MEREDITH,
Counsel for City.

STATE OF VIRGINIA,
City of Richmond, } *To wit:*

I, Ewd. J. Warren, a notary public in and for the city aforesaid, do hereby certify that Richard M. Taylor, mayor of the city of Richmond, this day personally appeared before me in my said city and made oath that the statements contained in the foregoing answer, so far as based upon his own knowledge, are true, and so far as based — information derived from others, he believes them to be true, and that the seal attached is the seal of the city of Richmond.

Given under my hand this 29th day of March, 1897.

EWD. J. WARREN, *N. P.*

"EXHIBIT C. OF R. NO. 1."

An Ordinance

As to the joint use of poles erected in the streets and alleys of the city of Richmond for the support of wires used in connection with the transmission of electricity.

(Approved July 18, 1891.)

Be it ordained by the council of the city of Richmond—

1. That all poles now erected in the streets or alleys of the city of Richmond for the support of wires used in connection with the transmission of electricity, shall hereafter be allowed to remain only upon the terms and conditions hereinafter set forth.

47 2. The committee on streets may hereafter require any person or company owning any of such poles to allow any other person or company to place upon its poles, and in such positions, any telegraph, telephone, electric light, electric power, electric car wires, or other wires used in connection with the transmission of electricity, now belonging or that may hereafter belong to any person or company, as the said committee, may from time to time deem proper, upon such terms and conditions as may be agreed upon by said owner and any person or company desiring to use such poles; and in the event that said owner and the person or company desiring to use said poles cannot agree upon satisfactory terms and conditions, the same shall be settled by three disinterested

persons, one to be selected by such owner, one by the person or company desiring to use said poles, and the third by the two persons so selected; and the terms and conditions, which shall be fixed and determined by said persons, or a majority of them, shall be the terms and conditions upon which said company or companies, respectively, shall use and occupy said poles. If the said owner shall, for thirty days after having been requested in writing to appoint its representatives, fail to make such appointment, then the city engineer shall make such appointment, and the person so appointed shall have the powers he would have had if he had been appointed by the said company. If the two arbitrators selected in either of the two manners above specified, shall fail for thirty days after their appointment to select the third arbitrator, then the city engineer shall select such third arbitrator, and when so selected, he shall have the same powers he would have had if he had been appointed by the said two arbitrators. Or, if after the three arbitrators shall have been appointed in any of the modes above specified, they shall fail to settle and determine said terms and conditions within thirty days from the date of the appointment of said third arbitrator, then the city engineer shall have power to select a person who shall have power to settle and determine said terms and conditions. Should either the said owner or any person or company that may, under this section, enter upon and use the poles of the said owner, fail to keep and perform each and every one of the terms as to the use of the said poles, the company so failing shall be liable to a fine of not less than ten nor more than one hundred dollars for such failure; each failure to be a separate offence. The said committee shall have power to require the said owner to allow any person or company desiring to enter upon and use said poles, to so enter and use
48 the same, under such conditions as the city engineer may prescribe, as soon as the said person or company so desiring to enter shall have appointed its arbitrators; but the person or company so entering shall do so with the understanding that he or it will abide by and conform to the terms and conditions determined upon by the arbitrators, as soon as such decision shall be announced. And the said committee shall have power also to require, from time to time, the said owner or any other person or company using said poles to afford and furnish such protection or protections to all wires on such poles as the said committee may deem proper or necessary, in order to allow such wires to perform the purposes of functions for which they were intended. All work as to placing of wires now upon the poles of any other company, shall be done at the cost and expense of the party desiring to use such poles. For any failure to perform any requirement ordered under this section, within ten days after being notified of such requirement by the city engineer, each party so in default shall be liable to a fine of not less than ten nor more than one hundred dollars, each day's failure to be a separate offence.

3. Hereafter no pole shall be erected, nor any wire or other apparatus used in connection with the transmission of electricity, be placed in position in any street or alley of said city, until the city

engineer shall have first determined upon the size, quality, character, number, location, condition, appearance, and manner of erection of such poles, wires or other apparatus. Whenever, at any time, the said poles, wires or other apparatus shall, in the opinion of the city engineer, need changing in size or location, replacing, repairing, being made safe and secure, or being put in proper and suitable condition and appearance, such one of the persons so using the same—if there be more than one, as shall be selected by the city engineer—shall immediately proceed to do such changing as to size and location, replacing, repairing, making safe and secure, or putting into proper and suitable condition and appearance, as the said engineer shall designate, in writing, and all damage done to any street, by the erection of any pole shall, from time to time, be rectified and repaired as required by the city engineer. All expenses arising from any materials furnished or work done under this section, shall be borne in such proportions, by all persons using such poles, wires or other apparatus, as the city engineer may deem fair, unless the parties can agree upon satisfactory terms within ten days from the time such changes or repairs shall have been completed.

49 4. No person or company shall use the poles, wires or other apparatus above referred to of any other person or company until he or it shall have filed with the city engineer a written application fully set- forth what poles, wires or other apparatus he or it shall desire to use, nor until receiving from said engineer a written permission to so use the same in accordance with the provisions of this ordinance.

5. The city council hereby reserves the right to put at any time other restrictions and regulations as to the erection and use of said poles, wires and other apparatus used in connection with the transmission of electricity.

6. The city engineer may require from time to time the owner of any wires such grouping and cabling as he may deem necessary and proper.

7. The officials of the Richmond fire department and fire-alarm and police telegraph department are to have the power to cut any wire of said company whenever deemed necessary for the protection of the city's interest. And the said department shall have the right to use any such poles, whenever or wherever deemed desirable for wires for said departments, free of charge.

8. Nothing in this ordinance is intended to relieve any person or company of any condition, restriction or requirement imposed upon said person or company by the ordinance under which it has been authorized to place in said streets or alleys any poles, wires, or other apparatus for the transmission of electricity.

9. Each and every provision of this ordinance shall apply to any pole, wire, or other apparatus used in connection with the transmission of electricity hereafter erected in said streets or alleys, whether the same be erected by way of repairs or for any other purpose.

10. Any person or company violating any restriction, provision,

or condition imposed by this ordinance, or failing to perform any requirement made by the city engineer under this ordinance, shall be liable to a fine of not less than ten nor more than one hundred dollars, to be imposed by the police justice of said city; each day's violation or failure to be a separate offence.

This ordinance shall be in force from its passage.

50 *Replication.*

Filed May rules, 1897.

In the Circuit Court of the United States for the Eastern District of Virginia.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, a Corporation Duly Incorporated, Organized, and Existing under the Laws of the State of New York, Plaintiff,

vs.

CITY OF RICHMOND, a Municipal Corporation Incorporated and Existing under the Laws of the State of Virginia, Defendant.

} In Equity.

The replication of The Southern Bell Telephone and Telegraph Company, complainant, to the answer of The City of Richmond, defendant.

This repliant, saving and reserving unto itself now, and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, says that it will aver, maintain and prove its said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant. Without this that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its said bill it has already prayed.

SOUTHERN BELL TELEPHONE AND TELEGRAPH CO.,
By LEAKE & CARTER,
STILES & HOLLADAY, *Its Solicitors.*

51 *Statement as to Evidence.*

It is agreed between the parties to this controversy by and through their respective counsel that instead of taking depositions and introducing witnesses to prove or identify different papers, written

statements of what the witnesses would testify to, will be received as evidence and the papers will be regarded as introduced without such identification.

1st. The paper marked "Bell Ex. No. 1," is a copy of the charter of incorporation of the complainant by which it was duly chartered as therein stated.

2nd. The paper marked "Bell Ex. No. 2," is a copy of the minutes of the meeting at which the complainant was organized.

3rd. The papers marked "Bell Ex. No. 3," *is* a copy of the acceptance by the complainant of the terms of the act of Congress, approved July 24th, 1866, as to the construction of telegraph lines, filed February 18th, 1889, and certificate.

4th. That the pamphlet marked "Bell Ex. 4," beginning on page 22 thereof and continuing through said pamphlet, is a correct copy of a contract entered into on the 10th day of November, 1879, between the Western Union Telegraph Company, acting for itself and others, of the first part, and the National Bell Telephone Company, which afterwards became or was merged into the American Bell Telephone Company of the second part.

5th. The paper marked "Bell Ex. No. 5," is a contract entered into September 1st, 1888, between the said American Bell Telephone Company and the Southern Bell Telephone and Telegraph Company.

6th. The paper marked "Bell Ex. No. 6," is a copy of an agreement between the Western Union Telegraph Company, acting for itself and others, of the first part, the American Bell Telephone Company, of the second part, and the Southern Bell Telephone and Telegraph Company of the third part.

7th. The paper marked "Bell Ex. No. 7," is a pole license from the Western Union Telegraph Company to the complainant to use certain of its poles upon the terms therein set forth. The complainant showed to the counsel for the city other such licenses or contracts for certain poles in Henrico county on the York River
52 railroad, and for certain poles from Richmond to Bon Air, in Chesterfield county, Va. But it is *agree-* that the other contracts need not be filed.

8th. The paper marked "Bell Ex. No. 8," is a list of the places outside of Richmond and not in Henrico county, in which Richmond is situated, connected by telephone through the main office of the complainant in Richmond with the Richmond office of the Western Union Telegraph Company.

9th. The paper marked "Bell Ex. No. 9," is a letter from vice-president of the Western Union Telegraph Company to the American Bell Telephone Company. Accompanying said letter and attached to it is a receipt from said telegraph company to the said American Bell Tel. Co. as to certain instruments for telephonic purposes. The complainant showed to the counsel for the city other such receipts, dated April 21st, 1887, March 23, 1895, and Nov. 3, 1896 (all of which instruments mentioned in said receipts were and are used as agreed), but it is agreed between the parties that the other receipts need not be filed.

10th. The paper marked "Bell Ex. No. 10," is a statement of amounts received by complainant from Western Union for telegrams received and delivered by telephone at Richmond, Va., to and from the said telegraph company since January 1st, 1894.

11th. The paper marked "Bell Ex. No. 11," is a newspaper statement, substantially correct, as to what took place at a meeting of the committee on streets on the — day of Sep., 1896.

12th. The paper marked "Bell Ex. No. 12," is an affidavit from R. B. Rood, which is to be treated as if it were his deposition. Affidavit includes statements on both sides of the paper.

13th. The paper marked "Bill Ex. No. 13," is a statement from C. E. McClure, supt. So. Bell Telephone and Telegraph Co., which is to be treated as if it were his deposition.

14th. The paper marked "Bell Ex. No. 14," is a statement of the number of subscribers of the complainant outside of the city of Richmond, but in Virginia, connected with the main office in said city, and through the same with other 'phones in said city of the complainant.

The paper marked "Bell Ex. No. 15," is a statement from Mr. J. B. Tree, supt. of Wes. Union Tel. Co. in Richmond Va.,
53 which is to be treated as if it were his deposition.

15th. The paper marked "C. of R. Ex. No. 1," is the ordinance mentioned in the bill of complaint as passed and approved July 18, 1891. (See Ex. of R. No. 1, filed with answer.)

16th. The paper marked "Ex. C. of R. No. 2," is an affidavit by W. H. Thompson, supt. city fire alarm of Richmond, and is to be treated as if it were his deposition.

17th. The paper marked "Ex. C. of R. No. 3," is a correct copy of the minutes of the committee on streets as to how the two ordinances, filed with the bill of complaint as Exhibits "G" and "H," *was* ordered to be drawn by the city engineer and city attorney.

18th. The patents used by the plaintiff company are the patents referred to in the "Telephone cases," 126 U. S. Reports, and describe the method of communication therein patented, as set out in the drawings and specifications of said patents as shown. Copies of which, as set forth in said 126 U. S. Rep., from page 4 to 23, inclusive, are to be considered evidence in this case, and may be read and referred to by either party to this cause in any court to which this case may go, but are not to be copied as a part of the record, unless required by the court.

The charter of the respondent city is found in the act of assembly of Virginia, approved May 24th, 1870. The charter, among other provisions therein, contains the following:

"SECTION 19. The city council shall likewise have the power to make such ordinances, by-laws, orders and regulations as they may deem desirable to carry out the following powers, which are hereby vested in them."

Subdivision 7th. "To close or extend, widen or narrow, lay out and graduate, pave and otherwise improve streets and public alleys in the city. * * * They may prevent or remove any structure, obstruction or encroachment over or under or in a street or alley, or

any sidewalk thereof; and no company shall occupy with its works the streets of the city without the consent of the council."

Subdivision 8th. "To prevent the encumbering of streets, avenues, walks, public squares, lanes, alleys or bridges in any manner whatever."

54 Subdivision section 17. "To require and compel the abatement and removal of all nuisances within said city, at the expense of the person or persons causing the same."

It is agreed that the entire city charter shall be regarded as in evidence for the purpose of argument before any court to which this cause shall go, but in case of an appeal is not to be copied in the record.

It is also agreed that in case of an appeal the two papers, "Bill Ex. No. 4" and "Bill Ex. No. 5," are not to be copied in full into the record, but only such portions as each side instruct the clerk it will desire to be inserted.

The undersigned states that he is the city attorney of Richmond, and has held that office for several years; that the committee on streets of the city council of Richmond is simply a committee of certain members of the two branches of the city council with no legislative power, and with no power to take any action to remove any poles or wires of the complainant from any street in said city of Richmond without instruction and authority from the city council, that no such instruction or authority was ever given. In effect the powers of the committee, except where authorized by the council, are merely to inquire into and to recommend action by the city council. The undersigned further states that neither W. H. Thompson, superintendent of the Richmond City fire alarm, nor Col. Cutshaw, city engineer, had any authority to bind the city, nor to speak for the city council as to any action it might take in regard to the matters mentioned in the statements of Mess. Rood, manager, and McCluer, superintendent, filed in this cause. They were and are merely ministerial officers in their respective departments.

C. V. MEREDITH.

July 17th, 1897.

The above, it is agreed, is to be treated as if it were the deposition of the said C. V. Meredith.

COMPLAINANT,
By STILES & HOLLADAY,
LEAKE & CARTER.
CITY OF RICHMOND,
By C. V. MEREDITH.

55 "BELL EXHIBIT NO. 1."

Certificate of Association of the Southern Bell Telephone and Telegraph Company.

Know all men by these presents that we, the undersigned, do hereby associate ourselves together, under and by virtue of an act

of the legislature of the State of New York, entitled "An act to provide for the incorporation and regulation of telegraph companies," passed April 12th, 1848, and the various acts amendatory thereof, for the purpose of owning or constructing, using and maintaining a line or lines of electric telegraph, partly within and partly beyond the limits of the State of New York, or for the purpose of owning some interest in such line or lines and such grants as may be obtained therefor, and do hereby certify as follows:

I. The name assumed to distinguish this association, and by which it may sue and be sued, is the Southern Bell Telephone and Telegraph Company.

II. The general route of the line or lines of telegraph of this association, and the points to be connected therewith, shall be as follows: From the office of the association, at number 197 Broadway, or elsewhere, in the city of New York, by some convenient route through or across the States of New Jersey, Pennsylvania, Delaware, Maryland and Virginia, or otherwise to the city of Wheeling or some other convenient point in the State of West Virginia, and thence to and between and throughout various cities, towns, points and places within that part of the State of West Virginia lying south of the Baltimore and Ohio railroad, and within the States of Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida, the said line or lines to connect the said cities of New York and Wheeling together, and the said other cities, towns, points and places, or some of them, or points within the same, together or with each other or with said cities of New York and Wheeling.

III. The capital stock of this association shall be one million dollars, divided into ten thousand shares of the par value of one hundred dollars each.

IV. The names and place of residence of the stockholders of this association, and the number of shares held by each of them, respectively, are as follows:

56 Names.	Place of residence.	No. of shares.
Hamilton McK. Twombly	New York, N. Y.	2,500
De Lancey H. Louderback	" "	1,250
Anson Stager	Chicago, Ill.	2,500
James M. Ormes	Richmond, Va.	3,750

This association shall commence on this 11th day of December, 1879, and terminate on the eleventh day of December, 1929.

Witness our hands and seals this 11th day of December, 1879.

(Signed) H. McK. TWOMBLY. [s.]
(Signed) DELANCEY H. LOUDERBACK. [s.]
(Signed) ANSON STAGER. [s.]
(Signed) JAMES M. ORMES. [s.]

STATE OF NEW YORK, }
City and County of New York, } ss:

On this eleventh day of December, in the year 1879, before me personally came Hamilton McK. Twombly, De Lancey H. Louder-

back and James M. Ormes, to me known to be the individuals described in, and who executed the foregoing instrument, and severally acknowledged that they executed the same for the purposes therein mentioned.

(Signed) WM. ARNOUX,
[SEAL.] *Notary Public, Kings and N. Y. Counties.*

STATE OF ILLINOIS, }
County of Cook, City of Chicago, } ss:

I, Philip A. Hayne, a commissioner for the State of New York, residing in Chicago, in the county of Cook and State of Illinois, do hereby certify that on the fifteenth day of December, one thousand eight hundred and seventy-nine, personally appeared before me in said city, county and State, Anson Stager, to me known to be the same person described in, and who executed instrument of writing and acknowledged the same to be his free act and deed.

In testimony whereof I have hereunto set my name and affixed my official seal at Chicago in said State and county this fifteenth day of December, one thousand eight hundred and seventy-nine.

(Signed) PHILIP A. HAYNE,
[SEAL.] *Commissioner for New York in Chicago, Illinois.*

57 STATE OF NEW YORK, }
City and County of New York, } ss:

I, Hubert O. Thompson, clerk of the said city and county, and clerk of the supreme court of said State for said county, do certify, that I have compared the preceding with the original certificate of association, together with the acknowledgments thereto annexed, on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

Endorsed, filed and recorded 17 Dec., 1879, 3h. 50.

In witness whereof I have hereunto subscribed my name and affixed my official seal this 17th day of December, 1879.

[SEAL.] HUBERT O. THOMPSON, *Clerk.*

(Endorsed:) Certificate of association of the Southern Bell Telephone and Telegraph Company. Filed December 20, 1879. Geo. Moss, deputy secretary of state.

STATE OF NEW YORK, }
Office of the Secretary of State, } ss:

I have compared the preceding with the certified copy certificate of incorporation of Southern Bell Telephone and Telegraph Company filed in this office on the twentieth day of December, 1879, and do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

State of New York, Secretary of State.

Witness my hand and the seal of office of the secretary of state, at the city of Albany, this fourteenth day of December, one thousand eight hundred and ninety-five.

ANDREW DAVIDSON,
Deputy Secretary of State.

58 "BELL EXHIBIT No. 2."

Minutes of the Southern Bell Telephone and Telegraph Comp'y.

Minutes of meeting of the incorporators of the Southern Bell Telephone and Telegraph Company, held in the office of the Western Union Telegraph Company, on Thursday, January 15, 1880, for the purpose of organizing the company.

Present: Messrs. Anson Stager, Hamilton McK. Twombly, Delancy H. Louderback, and James M. Ormes, all of said incorporators.

On motion, it was resolved, that Anson Stager be appointed chairman of this meeting, and Clarence Cary secretary *pro tem.*

The proposed by-laws of the company, consisting of 8 articles, were read, unanimously adopted, and approved, as follows, viz:

* * * * * * *
* * * * * * *

The secretary was appointed to cast the ballot for the election of directors to serve for the ensuing year.

The ballot being cast, the following gentlemen were declared to be elected directors, viz:

Norvin Green,
Samuel F. Barger,
Jno. Van Horne,
George W. Trabue,
James M. Ormes,
E. W. Cole,
P. R. Bridges,
Williams C. Wickham,
Anson Stager,
Augustus Schell,
Hamilton McK. Twombly,
Delancey H. Lauderback,
Henry B. Plant,
John B. Whitehead,
E. P. Alexander.

On motion adjourned.

(Signed) CLARENCE CARY,
Secretary pro Tem.

Minutes of meeting of the board of directors of the Southern Bell Telephone & Telegraph Comp'y, held in the office of the company, at 197 Broadway, New York, the 21 day of January, 1880.

Present: Messrs. Stager, Twombly, Barger, Ormes, Louderback, Trabue, Plant, Alexander, and Schell.

Mr. Schell was appointed chairman of the meeting.

The by-laws adopted at the meeting of incorporators, held 15th inst., were read and unanimously adopted.

59 The minutes of meeting of the board held on 17 instant, were read and approved.

The meeting then proceeded to elect, by ballot, a president and vice-president, and Mr. Twombly was unanimously appointed teller to cast the vote.

The vote being cast Mr. Twombly announced the same, as follows:

For Anson Stager, as president, 8 votes.
" H. B. Plant, as vice-president, 9 votes.

The chairman therefore declared that Anson Stager was duly elected president, and H. B. Plant vice-president.

Mr. Schell thereupon resigned the chair in favor of President Stager.

It was unanimously—

Resolved, That Mr. D. I. Carson be appointed secretary.

It was unanimously—

Resolved, That Mr. R. H. Rochester be appointed treasurer.

The following directors were unanimously appointed to act as an executive committee, in accordance with the by-laws of the company, viz:

Norvin Green, Samuel F. Barger,
James M. Ormes, G. W. Trabue.
H. McK. Twombly.

* * * * * * *

On motion, adjourned.

(Signed) CLARENCE CARY,
Sec'y pro Tem.

" BELL EXHIBIT NO. 3."

POST-OFFICE DEPARTMENT,
WASHINGTON, D. C., *Feb'y 18th*, 1889.

I, Don M. Dickinson, Postmaster General of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this department.

Post Office Department, United States of America.

In testimony whereof I have hereto set my hand and caused the seal of the Post-office Department to be affixed, at the city of Washington, the day and year above written.

DON M. DICKINSON,
Postmaster General.

60 To all whom it may concern:

Be it known that the Southern Bell Telephone and Telegraph Company, a corporate body organized under the laws of the State of New York, through its duly authorized officers, whose signatures are hereunto attached, does hereby accept, without reservation, all of the restrictions and obligations of the act of Congress approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes." And the said company does especially agree that telegrams between the several departments of the Government and their officers and agents shall at all times have priority over all other business in their transmission over

the lines of said company, and that the charges for such telegrams shall not exceed the rates annually fixed by the Postmaster General.

This declaration of acceptance is made in order that said Southern Bell Telephone and Telegraph Company may be entitled to the rights and privileges granted by the act of Congress aforesaid.

Done at New York city this thirteenth day of February, 1889.

[Seal Southern Bell Telephone and Telegraph Co.]

SOUTHERN BELL TELEPHONE
& TELEGRAPH CO.,
By JOHN VAN HORNE, *President.*
D. J. CARSON, *Secretary.*

"BELL EXHIBIT No. 4."

Contract of November 10th, A. D. 1879.

This agreement, made this 10th day of November, 1879, by and between the Western Union Telegraph Company, for itself and for the Gold and Stock Telegraph Company, American Speaking Telephone Company, and Harmonic Telegraph Company, which it represents, party of the first part, and the National Bell Telephone Company, party of the second part, witnesseth:

Article 1. (1.) The party of the second part shall pay to the party of the first part, upon all telephones used in the United States, under any license from the party of the second part, express or implied, unless expressly excepted, a royalty or bonus of twenty per cent. of all rentals or royalties actually received or rated as paid in accordance with the provisions of this contract, from licenses
61 or leases for speaking telephones (exclusive of call-bells, batteries, wires, and other appliances, or services furnished or performed). The rentals or royalties upon which said royalty or bonus to be paid to the party of the first part is to be reckoned, shall, for that purpose, be ascertained by deducting from the gross rental or royalty received or rated as hereinafter declared, the commissions and allowances herein provided for.

Article 2. * * *

(1.) The word "telephone," as used in this contract, refers to an instrument for electrically transmitting or receiving articulate speech, and is understood to mean either a transmitting instrument, incapable of use as a receiver, a receiving instrument incapable of use as a transmitter, or an instrument capable of being used both as a transmitter and receiver.

Article 6. Except as herein provided, the first party and the companies it represents agree to withdraw from the manufacture, rental and use of telephones.

Article 7. The party of the first part agrees to give assistance and co-operation in developing and extending the use of the telephones of the party of the second party and that the party of the

second part shall, during the term of this contract, and when in the judgment of the first party it shall not interfere with the enjoyment of the same by said first party for telegraphic purposes, have permission to build lines under any franchises, contracts, licenses or rights of way enjoyed or controlled by the party of the first part, or to use any poles, fixtures, structures, or plant of said first party, upon reasonable terms, subject, however, to a revocation of such license to use any poles, structures, fixtures, or plant, at any time, by reasonable notice to the party of the second part.

Article 12. * * *

(2.) For the purpose of this contract it is agreed that an "exchange," or "a district or exchange system" applies to a system in which different stations on the same or different circuit, and either within any city or town, or within a radius of fifteen miles of a central office (or within wider limits, where existing contracts have granted wider limits), are connected with such central office or branch offices within said territory for the purpose of placing subscribers or other parties by such circuits in communication with such central or branch offices, or with each other, either directly or through the agents of the system.

62 Article 13. (1.) The right to connect telephonic district or exchange systems for the purpose of personal conversation between persons at the instruments, and the right to use telephones on all lines not forming a part of a telephonic district or exchange system for such personal conversation (except so far as licenses for private lines are to be granted to the party of the first part under article 14) are to remain exclusively with the party of the second part, and those licensed by it for the purpose.

But such connecting and other lines are not to be used for the transmission of general business messages, market quotations, or news for sale or publication in competition with the business of the Western Union Telegraph Company, or with that of the Gold and Stock Telegraph Company; and the party of the second part, so far as it lawfully and properly can prevent it, will not permit the transmission of such general business messages, market quotations or news for sale or publication over lines owned by it, or by corporations in which it owns a controlling interest, nor license the use of its telephones or patents for the transmission of such general business messages, market quotations or news for sale or publication in competition with such telegraph business of the Western Union Telegraph Company or that of the Gold and Stock Telegraph Company.

(2.) The terms "general business messages" and "telegraph messages," or "messages for hire," are defined to mean all communications in behalf of other parties than those who directly communicate by the telephone by themselves or their servants or agents personally present at the instrument; and no person engaged in the business of transmitting messages for other parties shall be authorized or knowingly allowed by the party of the second part, or its servants or agents, to transmit such messages through the telephone.

Article 14. (1.) The party of the second part will fully license the party of the first part to use telephones procured from it for transmitting telegraphic messages, and for use on private lines, with the right to sublet the use thereof along with such private lines, for such purposes as such private lines have been and are being used, except in territories where exclusive agency contracts inconsistent with this agreement to license already exist, and during the continuance of such agencies, in which cases they may obtain them from such agents.

(2.) For the purposes and uses aforesaid, the party of the
63 first part shall be furnished with telephones, with licenses from the party of the second part to use such telephones and other inventions owned or controlled by it for use in connection with telephone lines, on terms which may be established from time to time, and which shall be as favorable as those on which they are furnished to any other parties for like uses, and shall be allowed a discount as provided in article 2.

Article 15. (1.) The second party will turn over and deliver to the Western Union Telegraph Company of the first part, or its agents, exclusively, all messages for transmission to other points by telegraph, collected by or coming on the wires or within the control of its telephonic exchanges or district systems or those of its licensees, wherever the first party has wires and is prepared to receive or transmit the same, so far as said second party can lawfully control the same, and unless otherwise specially directed by its customer-; but will not solicit such special direction nor receive and pay tolls for transmission over other lines, unless compellable by law so to do. And the first party shall forward the same to destination, subject to its established rules and regulations, upon payment of regular tolls, and pay to said second party a commission of fifteen per cent. on all the tolls received for transmitting such messages over its lines; the commission not to include tolls for the transmission over other lines, nor tolls for transmitting cable messages. For delivery service of telegraphic messages made through said second party or its license-s and for collecting through a messenger service for delivery to said telegraph company, the party of the first part will pair a fair compensation, the same that is paid to district telegraph companies for similar services.

(2.) If the second party, for the purpose of doing a general telegraph or telephone business, shall connect a telegraph station of the Western Union Telegraph Company by a branch line with any place in territory occupied or covered by the Western Union Telegraph Company which has no Western Union line or office, it shall turn over and deliver to the Western Union Telegraph Company, exclusively, so far as it has legal power to control the same (unless it be specially directed by the customer sending the same that they be forwarded by some other route), all messages collected from such points so connected. And said Western Union Telegraph Company will, as hereinafter provided, receive and forward the same upon payment of regular tolls, and pay to the second party or its agents

a commission of ten per cent. upon the tolls received for
64 transmitting such messages over the Western Union Telegraph lines (cable messages excepted from such commission); and there shall be added to the rate of tolls to be collected from customers a further rate, not to exceed ten cents per message of ten words on such branch lines of the length of ten miles or less, and five cents additional per message of ten words for each additional ten miles or fraction thereof in length of said branch lines, and at the same rate for longer messages; such tolls so added shall belong to the party of the second part.

(3.) When the second party shall have constructed such branch lines to such new points within the territory occupied or covered by the Western Union Telegraph Company, but not theretofore reached by its telegraph lines, and the telegraph company of the first part shall thereafter elect to construct its lines of telegraph to such new points, it shall, if required by said second party, take and pay for the lines of the second party at cost, and also pay said second party the commission provided in section (2) of this article on all the business taken at such point for the period of twelve months thereafter. But if the party of the second part shall elect to keep its own lines the provisions contained in article 13 against the transmission of general business and other messages shall apply to such line.

(4.) Where any messages are to be delivered between the parties through the telephone, said party of the first part is to afford to the party of the second part, at the expense of the second party, the facilities for providing a telephone connection between its office and the office of the district exchange or branch line, and shall at its own office, without further costs to the party of the second part or its licensees, receive or transmit said messages over said connecting line by its own clerks, who for that purpose shall be the agents of the second party and subject it to its rules and regulations.

(5.) It is also agreed by the party of the first part, for itself and those it represents, that it will not connect its telegraph lines with any telephonic district or exchange system other than those licensed by the party of the second part, so far as it lawfully can refrain from so doing, except in districts and during the time temporarily excepted from the operation of this contract.

(6.) All messages or communications of customers delivered by either of the parties to the other for further transmission over its telegraph or telephone lines, as the case may be, shall be deemed to
65 have been delivered and received subject to such established rules, regulations and conditions of the receiving company as may have been established and promulgated by it for the government of its business and not otherwise; and for the purpose of regulating and limiting the responsibility of the party receiving from the other a message or communication in this manner, it shall be the duty of the company receiving the message directly from the customer to require his assent to such rules, regulations and conditions of the other company by writing his message or communica-

tion upon the regular contract blanks of such company, or blanks containing an equivalent contract, or in such other manner as may be generally required by such company for that purpose from its direct customers; and if either company, dealing with the customer in the first instance, shall fail in the duty last above stipulated, it shall hold the other company harmless from all claims for damage which it may be compelled to pay to the customer because of the absence of a contract arrangement with such customer subjecting the business in question to such established rules, regulations and conditions of the company thus rendered liable to the customer; the object of this stipulation being to limit the responsibility of each party to matters happening upon its own lines; and to secure the regulation of that responsibility in respect to all business originating beyond its own lines, in the same manner as such responsibility shall be regulated in respect to business beginning, continuing and terminating upon its own lines. Whenever any such rules, regulations or conditions shall be established or modified by either party the same shall be notified to the other party.

Article 17. This contract shall go into effect as of the first day of November, 1879, and shall be and remain in force until the expiration of seventeen years thereafter. It shall cover the whole territory of the United States, except that included in the Ormes contract (which territory shall be included in this contract upon the expiration of said Ormes contract), and those conflicting localities hereinbefore referred to and temporarily excepted, and shall cover them as soon as those exceptions expire. Said Ormes contract is a contract dated August 26, 1879, to which James M. Ormes, the Western Union Telegraph Company acting for the same parties as in this contract, and the National Bell Telephone Company are parties; the territory covered by it is as follows: West Virginia south of the Baltimore and Ohio railroad, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama. For the further contents of said contract, so far as is material, reference thereto is hereby made.

66 Article 19. It is understood and agreed that nothing herein contained shall be construed as imposing upon either party any obligation to do or not to do at any time anything contrary to law; and if anything herein covenanted or contemplated to be done or not to be done shall be or become contrary to the law of the land, the consequent inability and failure to perform the same shall not operate as a dissolution of this contract, nor to give to either party a right of action against the other.

Article 20. All the provisions and stipulations herein contained and described as incumbent on or for the benefit of the parties hereto, shall be incumbent on or for the benefit of their respective successors or assigns.

In witness whereof said Western Union Telegraph Company hath caused these presents to be subscribed by its president and its corporate seal to be hereto affixed by its secretary, and said National Bell Telephone Company hath caused its corporate seal to be hereto

affixed by its clerk and these presents to be subscribed by its president and treasurer on the day first above written.

THE WESTERN UNION TELEGRAPH COMPANY,
By NORVIN GREEN, *Pres't.*

[Seal Western Union Tel. Co.]

Attest: A. R. BREWER, *Sec'y.*

THE NATIONAL BELL TELEPHONE COMPANY,
By W. H. FORBES, *Pres't.*
GEO. L. BRADLEY, *Treas.*

[Seal National Bell Telephone Co.]

Attest: CHAS. EUSTIS HUBBARD, *Clerk.*

"BELL EXHIBIT No. 5."

This agreement made this — day of September, A. D. 1888, by and between the American Bell Telephone Company, a corporation created under the laws of the Commonwealth of Massachusetts, of the first part, and the Southern Bell Telephone and Telegraph Company, a corporation created under the laws of the State of New York, of the second part,

Witnesseth, whereas the second party holds certain license
67 contracts (a schedule of which is hereto annexed, marked "A"), which were issued by said The American Bell Telephone Company or by the National Bell Telephone Company, the predecessor in business of said The American Bell Telephone Company; and

Whereas the second party desires to surrender said several license contracts and to have certain other license contracts, and the first party has agreed to accept such surrender and to enter into such other license contracts, as hereinafter set forth.

Now, therefore, it is agreed as follows:

1. The second party shall surrender and give up to the first party said several license contracts named in Schedule "A," and all and singular the rights of it, said second party thereto, in, to and under the same.

2. The first party agrees that it will accept such surrender, and that it will thereupon enter into the following-described license contracts with the second party; that is to say:

(*a.*) License contract for exchange purposes, form 109 D, hereto annexed, marked "B,"

(*b.*) License contract for extraterritorial connecting lines, form 113 D, hereto annexed, marked "C,"

(*d.*) But the second party shall perform any and all contracts with subscribers made under said license contracts, or any or either of them, so to be surrendered and existing at the time of such surrender, and shall hold all telephones furnished thereunder (schedules of which telephones are hereto annexed, marked "E")

as the property of said The American Bell Telephone Company, each under the license contract for like purposes as that under which it was originally furnished, so to be made with it, said second party, and with like effect as if actually furnished thereunder, except that rental and royalty thereon shall begin at the date of such new license contract.

In witness whereof the parties hereto have caused their respective corporate seals to be affixed hereto and these presents to be signed in duplicate by their respective officers duly authorized.

THE AMERICAN BELL TELEPHONE CO.,

By its general manager, C. J. F.

[Seal American Bell Telephone Co.]

Approved:

JOHN E. HUDSON.

H. STOCKTON, *President.*

68 SOUTHERN BELL TELEPHONE & TELEGRAPH CO.,

By JNO. VAN HORNE, *President.*

[Seal Southern Bell Telephone and Telegraph Co.]

D. J. CARSON, *Secretary.*

Contract for Exchanges.

Form 109 D.

This agreement, made this first day of September, A. D. 1888, by and between the American Bell Telephone Company, a corporation created under the laws of the State of Massachusetts, lessor and licensor, party of the first part, and the Southern Bell Telephone and Telegraph Company, a corporation created under the laws of the State of New York, lessee and licensee, party of the second part, witnesseth:

(1.) Whereas the lessor owns the letters patent of the United States granted to Alexander Graham Bell, March 7, 1876, and January 30, 1877, numbered 174,465, 186,787, respectively, and owns or has the right to use, and may hereafter own or have the right to use, sundry other inventions, which are or may be embodied in electric-speaking telephones, and desires to extend the use of telephones licensed by it in every manner in which the public may wish to use the same, and for that purpose to provide for the construction and use of the apparatus and lines necessary to be used in connection therewith; and whereas the lessee desires to obtain the use of telephones under lease and license from the party of the first part to be used with the lines of telephonic district or exchange systems established and owned by it in the territory hereinafter described under the provisions hereinafter set forth; now it is agreed as follows:

(2.) The rights hereby granted shall be perpetual, unless determined as hereinafter provided, and shall extend to all exchanges

established and owned by the licensee, and wholly within the following-described territory, namely: the State of West Virginia (excepting the counties of Barbour, Brooks, Doddridge, Hancock, Harrison, Marion, Marshall, Monongalia, Ohio, Pleasants, Preston, Ritchie, Taylor, Tucker, Tyler, Wetzel, Wirt and Wood), and the States of Virginia, North Carolina, South Carolina, Georgia, Florida and Alabama.

69 (3.) For the purpose of this contract an "exchange," or "a district or exchange system" means a system in which different stations on the same or different circuits, and either within any city or town, or within a radius of fifteen miles of a central office, are connected with such central office or branch offices for the purpose of placing subscribers or other parties by such circuits in communication with such central or branch offices, or with each other, either directly or through the agents of the system. No office or line of an exchange can be connected with any point outside of its territory, nor with any telegraph company's office or line, except by lines of the licensor or parties specially designated by it for this purpose, nor, except in connection with such lines, can the lines of an exchange be used for performing any part of the work of transmitting messages by telephone to points outside its territory, and no telegraph company, unless specially permitted by the licensor, can be a subscriber or use the system to collect and deliver messages from and to its customers, nor shall any person use the same telephone in connection with different exchange systems.

(4.) The licensor, at its general office or factory, will deliver to the second party, as needed, electric-speaking telephones, made and to be used under its patents, during the existence of the rights hereby granted and as herein set forth and permitted, and all telephones delivered to the second party during the continuance hereof shall be deemed to be furnished hereunder, unless otherwise specially designated by the licensor. They will be of such character and pattern and bear such marks as the lessor shall from time to time determine, but the second party may choose from among such standard patterns. Each of said telephones shall remain the property of the licensor, and is hereby leased, and the use of it licensed under said patents and all others under which the lessor has or may have a right to license, so far as applicable thereto, for the purposes herein declared for the term of one year from the day when rent and royalty begin to accrue on it as provided in article 8, but the due payment thereof to the licensor, and the due performance of the stipulations hereof during said year, by the second party and those using the telephone under it, shall *ipso facto* operate to renew the lease and license for another year, and so on until the expiration or other determination hereof. The second party is hereby licensed to use said telephones for any purpose, upon circuits exclusively composed of the lines of any such exchange system, and to use

70 them in connection with the trunk lines reserved to the licensor by article 9, for the purposes and to the extent therein limited, during the term hereby created, upon condition and so long as the rental therefor shall be duly paid to the licensor and as the

provisions hereof are not violated, but not longer or otherwise; and it may grant said right to its customers by contracts as provided in article 7. The lessor will not license any telephones to be used by others upon an exchange system within said territory while the rights of the second party hereunder exist, except telephones to be used on the lines of exchanges having their central offices outside said territory by persons within said territory who are or may be subscribers to or customers of such exchanges; but the second party shall, by general or special exchanges, supply (so far as it is authorized so to do by this contract) all reasonable demands of the public, and shall be diligent to increase the number of telephones used on its exchanges. All rights not hereby specifically granted remain to the licensor.

(7.) The contract between the second party and those who are to use telephones under it, as herein provided, shall express, in such form as the lessor shall from time to time approve, that the telephone is the property of the licensor; that it is leased and licensed by it only as herein expressed; that all use of it otherwise is an injury to and invasion of the rights of the licensor as owner thereof and of the patent rights used therein and thereby, entitling it to all the remedies herein provided and to an injunction and other legal redress in a suit by it in its name and behalf. The second party shall require every person using said telephones for communications or messages sent or to be sent over other telephone or telegraph lines, to provide for payment of tolls thereon, and to make every such message subject to such stipulations, regulations and conditions respecting the liability of such lines for errors and mistakes as the licensor may from time to time require, and for that purpose will incorporate into its subscription contracts and message blanks such provisions and contracts to be agreed to by the subscriber and customer as the licensor may from time to time approve, and will hold the lessor harmless from all loss and expense consequent upon its failure so to do.

(9.) The licensor may enter the offices and connect with the exchange systems of the second party any lines to points without the territories of such exchanges, respectively, and to telegraph offices, in order to establish communication between customers of the exchanges and telegraph companies or parties reached by said
71 lines, and may there operate said lines with suitable appliances; the second party will permit and encourage its customers to use such lines, and by its own operators will receive and transmit such messages to and from its customers and subscribers, or make the proper switch board or other connections for direct communication, as may be requested, and in such manner, not inconsistent with the proper conduct of its office, as the licensor shall direct. But if the licensor is not satisfied with the manner in which it is performed, it may establish its own offices and trunk and radiating lines for this purpose. The second party will not, without special leave of the licensor, so far as it can lawfully prevent it, permit the transmission over such connecting lines of general business messages, market quotations or news for sale or publication,

nor any communications in behalf of other parties than those who directly communicate by the telephone by themselves or their servants or agents personally present at the instruments, and no person engaged in the business of transmitting messages for other parties shall be authorized or knowingly allowed by the second party to transmit such messages over such lines. The second party will cause each of its exchanges to turn over and deliver to the licensor and such parties as it may from time to time appoint, exclusively, all messages for electrical transmission to points outside the territory of such exchange collected by or coming on the wires or within the control of the exchange, where the licensor or such party has wires and will transmit the same, so far as the second party can lawfully control the same, and unless otherwise specially directed by its customers; but will not solicit such special directions, nor receive any pay tolls for transmission over other lines, unless compellable by law so to do. It shall keep and furnish an account of each such message transmitted or received, and of connections made therefor, and shall collect and on demand pay over to the licensor or its said appointees, respectively, the tolls for transmission beyond the exchange system, according to such rates and rules as each shall establish, and shall exhibit its accounts and the tickets from which they are made, so far as may be proper to verify the same. Each exchange shall, if and when so requested by the licensor, make proper switch-board or other connection between the lines of the licensor or its licensees from points without its exchange district and terminating in such exchange office, for the purpose thereby of making up a through line between points without such exchange district. In respect of all the business provided for by this section,

72 the second party shall make no charge to its own subscriber or customer, but shall make the following charges and none others: The second party shall receive upon communications originating within an exchange and passing over the lines of the exchange and the extraterritorial lines by direct connection, fifteen per cent. of the gross tolls on the extraterritorial line not to exceed five cents for any one message or communication occupying not more than five minutes; in case an exchange shall be required to make a switch-board connection for the purpose of making up a through line between points, without its exchange district, then the exchange shall receive as compensation for making such connection, such share of the through toll (terminal expenses being first deducted) as may be agreed upon, not, however, a greater share thereof than ten miles is of the whole length of the through line so made up, and not in any event to exceed five cents for any one communication occupying not more than five minutes; upon messages collected by an exchange over its lines or otherwise and forwarded by telegraph, the exchange shall receive fifty per cent. of the commission paid to the lessor by the telegraph company, and the whole of the compensation for messenger service paid by the telegraph company; for delivering telegraph messages by telephone to subscribers, an exchange may have free use of the lessor's line to the telegraph office, when such use does not interfere with the proper despatch of

outgoing business, and may receive from the telegraph company the whole of such compensation as it and the telegraph company may agree upon; for messages delivered by messenger for the telegraph company, it may receive the whole compensation. The licensor now appoints the Western Union Telegraph Company to perform all telegraphic transmission under this article.

Touching the lines which the first party may desire and direct to be built connecting the exchanges of the second party with the telegraph offices of the company or companies which the first party may appoint to receive the telegraph messages to be turned over by said second party.

Whereas the first party has, at the request of the second party, in consideration of its undertaking hereinafter in this paragraph contained, consented to increase the part to be paid the exchange of the commission paid the first party by the telegraph company upon messages turned over from twenty-five (25) per cent. to fifty (50) per cent. thereof:

Now the second party, in consideration thereof, agrees that
73 it will, at its own cost and without charge or expense to said first party, build, equip and maintain such lines and furnish all instruments necessary to be used for the operation thereof, except telephones to be used in the telegraph office, but that such lines when built shall become and remain the property of said first party.

Signed in duplicate on the day first above written.

THE AMERICAN BELL TELEPHONE CO.,
By its general manager, C. J. F.

Approved:

JOHN E. HUDSON.
H. STOCKTON, *President.*

[Seal American Bell Telephone Co.]

SOUTHERN BELL TELEPHONE & TELEGRAPH CO.;
By JNO. VAN HORNE, *President.*

[Seal Southern Bell Telephone and Telegraph Co.]

D. J. GARSON, *Secretary.*

Contract for Extraterritorial Connecting Lines.

Form 113 D.

This agreement, made this first day of September, A. D. 1888, by and between the American Bell Telephone Company, a corporation duly formed under the laws of Massachusetts, lessor and licensor, of the first part, and the Southern Bell Telephone and Telegraph Company, a corporation created under the laws of the State of New York, lessee and licensee, of the second part, witnesseth:

3. The lessee may construct lines between exchanges in said territory, and may use such lines for telephonic personal communication between a customer in one such exchange district and a customer in another such exchange district, and not otherwise, except in connection with lines mentioned in article 6 hereof owned or specially licensed by the lessor, and by it designated for that purpose, and then only as and for the purposes expressed in said article 6. The lessee shall not directly or indirectly connect its lines with any telephone or telegraph line or telephone exchange, except lines with which it has been by the lessor specially authorized to connect; nor deliver messages to be forwarded to destination by
74 telegraph to any telegraph company, except such as may be specially designated by the lessor for that purpose, so far as it can lawfully control the same, or unless specially directed by a customer so to do (but it will not solicit such special direction nor receive and pay tolls over other lines unless compellable by law so to do). For the purpose of establishing telephonic personal communication between customers as aforesaid, the lessee may have and exercise all the right to construct and operate telephone lines in said districts, and there maintain suitable offices and connect with exchange systems established or to be established, as aforesaid, which the lessor has reserved and is or may be entitled to grant for extra-territorial connecting lines under licenses to exchanges made or to be made as aforesaid; but the lessee shall connect with each local exchange and do its business so far as the same can, in the opinion of the lessor, conveniently be so done, with the customers thereof through said exchange, unless the American Bell Telephone Company, or its successors, shall decide that the exchange fails to furnish proper facilities. For the purpose of this contract an exchange district means a territory, not to cover more than a single town or city, or a circle of fifteen miles radius measured from a central point, which the licensor has included and covered or may hereafter include and cover in and by an exchange license.

Signed on the day above written in duplicate.

THE AMERICAN BELL TELEPHONE CO.,
By its general manager, C. J. F.

Approved:

JOHN E. HUDSON.
H. STOCKTON, *President.*

[Seal American Bell Telephone Co.]

SOUTHERN BELL TELEPHONE & TELEGRAPH CO.,
By JNO. VAN HORNE, *President.*

[Seal Southern Bell Telephone and Telegraph Co.]

D. J. CARSON, *Secretary.*

75 "BELL EXHIBIT NO 6."

(Copy.)

This agreement, made the first day of September, A. D. 1888, by and between the Western Union Telegraph Company, a corporation created under the laws of the State of New York, for itself and also acting for and being duly authorized by the Gold and Stock Telegraph Company, American Speaking Telephone Company and Harmonic Telegraph Company, corporations created under the laws of said State, of the first part, the American Bell Telephone Company, a corporation created under the laws of the Commonwealth of Massachusetts, of the second part, and the Southern Bell Telephone and Telegraph Company, a corporation created under the laws of the State of New York, of the third part.

Witnesseth, whereas the first party hereto, the National Bell Telephone Company and James M. Ormes entered into a certain agreement dated August 26th, A. D. 1879, touching the licensing and use of telephones in the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, Florida and a portion of West Virginia, to which agreement said The American Bell Telephone Company has been substituted as a party in the stead of said National Bell Telephone Company, and said Southern Bell Telephone and Telegraph Company as a party in the stead of James M. Ormes, under which agreement and the license contracts issued by the National Bell Telephone Company and the American Bell Telephone Company in pursuance thereof said Southern Bell Telephone and Telegraph Company, the third party hereto, is now operating exchanges and telephone lines in said territory; and

Whereas the corporations comprising the first party, and said National Bell Telephone Company entered into a certain agreement, dated November 10, A. D. 1879, wherein it was agreed that the territory covered by said agreement, dated August 26, A. D. 1879, should, at the "expiration" of said agreement, be included in said agreement dated November 10, A. D. 1879, and

Whereas the third party desires to enter into perpetual contract relations with the second party, and the second and third parties have agreed thereupon subject to the execution hereof.

Now, therefore, it is agreed as follows:

That said agreement dated August 26, A. D. 1879, be, and it is hereby terminated on and as of this date as to all parties
76 thereto, with like effect as if this date were the dates of expiration fixed in said agreement, and this determination shall be taken to be an "expiration" within the meaning of said agreement dated November 10, A. D. 1879, except that the bonus on telephones shall, until and including August 26, A. D. 1889, be and be paid by the second party and the third party to the first party as provided in said agreement dated August 26, A. D. 1879.

In witness whereof the parties hereto have caused their respective

corporate seals to be hereto affixed, and these presents to be signed in triplicate by their respective officers thereto duly authorized.

THE WESTERN UNION TELEGRAPH COMPANY,
Acting for itself and also for
THE GOLD AND STOCK TELEGRAPH COMPANY,
THE AMERICAN SPEAKING TELEPHONE COMPANY, AND
THE HARMONIC TELEGRAPH COMPANY,
(Signed) By NORVIN GREEN, *President.*
[SEAL.]
(Signed) A. R. BREWER, *Secretary.*
THE AMERICAN BELL TELEPHONE COMPANY,
By ITS GENERAL MANAGER.
Approved:
(Signed) JOHN E. HUDSON.
(Signed) H. STOCKTON, *President.*
[SEAL.]

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,
(Signed) By JNO. VAN HORNE, *President.*
[SEAL.]
(Signed) D. I. CARSON, *Secretary.*

77 The above-named Gold and Stock Telegraph Company, American Speaking Telephone Company and Harmonic Telegraph Company, hereby acknowledge the authority of the Western Union Telegraph Company to act for and represent them in executing the foregoing instrument, and agrees to be bound by and carry out its provisions.

In witness whereof said corporations have caused their respective seals to be affixed hereto and these presents to be signed in triplicate by their respective officers on this twenty-fifth day of January, A. D. 1889.

THE GOLD AND STOCK TELEGRAPH COMPANY,
[SEAL.] (Signed) By NORVIN GREEN, *President.*
(Signed) A. R. BREWER, *Secretary.*
THE AMERICAN SPEAKING TELEPHONE COMPANY,
[SEAL.] (Signed) By NORVIN GREEN, *President.*
(Signed) A. R. BREWER, *Secretary.*
THE GOLD AND STOCK TELEGRAPH COMPANY,
For THE HARMONIC TELEGRAPH COMPANY,
[SEAL.] (Signed) By NORVIN GREEN, *President.*
(Signed) A. R. BREWER, *Secretary.*

"BELL EXHIBIT No. 7."

(Duplicate.)

This agreement, made this 23rd day of October, 1894, between the Western Union Telegraph Company, hereinafter called the telegraph company, and the Southern Bell Telephone and Telegraph Company, licensee of the American Bell Telephone Company, hereinafter called the licensee.

First. The telegraph company, in consideration of the payment which the said licensee hereby agrees to make to the tele-
78 graph company of a pole rental charge amounting to two hundred and four ($204.00) dollars per annum, payable annually (in advance), hereby grants to the said licensee the right to attach to and maintain at its own expense upon the poles of the said telegraph company between Richland and Ashland, Va., (17 miles) two wires, together with the necessary insulators and fixtures therefor.

Second. The right of occupancy hereby granted is to be exercised by the said licensee subject to the regulations of the telegraph company, and in such manner as shall not conflict with the telegraph company's own use of said poles, nor interfere with the working of the use of its wires thereon; and this agreement shall be terminable at the will of either party at any time hereafter upon thirty days' written notice from the other of an intention to terminate the same, when said wires and fixtures shall be removed from said poles without delay at the expense of the licensee.

In case of such termination by the telegraph company, before the expiration of any year for which pole rental shall have been paid, then, and not otherwise, shall the telegraph company refund to said licensee the charge for pole rental for the unexpired portion of such year.

Third. No use of the telegraph company's poles, under this license, however extended, shall be taken as creating or vesting in the said licensee any ownership or property in said poles of the telegraph company.

Fourth. This license is personal to the said licensee, and is granted in accordance with and subject to the provisions of the agreement of November 10, 1879, between the Western Union Telegraph Company and others, and the National Bell Telephone Company.

This license is not assignable, and must be approved by an executive officer of the Western Union Telegraph Company.

In witness whereof the parties hereto have hereunto set their hands the day and year first above written.

THE WESTERN UNION TELEGRAPH COMPANY,
By J. B. TREE, *Superintendent.*

Approved: JNO. VAN HORNE,
Vice-Pres't W. U. Tel. Co.

THE SOUTHERN BELL TELEPHONE AND TELEGRAPH CO.,
By C. E. McCLUER, *Supt.*

79

(On margin:)

The licensee agrees to pay one-half the cost of furnishing and putting up new six-wire cross-arms including labor, bolts and washers and other expenses, and the whole cost of three steel pins in each arm between Richmond and Ashland.

"BELL EXHIBIT No. 8."

Places outside of Richmond connected by telephone with W. U. Telegraph Company office at Richmond, at which places there are no telegraph stations.

	Distance from Richmond.
Aylett's, King William Co., Va.	28 miles.
Kenwood, Hanover Co., Va.	14 miles.
Manquin, King Wm. Co., Va.	23 miles.
Minorsville, Va.	27 miles.
Old Church, Hanover Co., Va.	15 miles.
Pole Green, " " Va.	9 miles.
Ellerson's, " " Va.	6 miles.

R. B. ROOD, *Mgr.*

"BELL EXHIBIT No. 9."

(Copy.)

Executive office, Western Union Telegraph Company.

NEW YORK, *May 21st*, 1881.

American Bell Telephone Company, Boston, Mass.

GENTLEMEN: In accordance with your request of sundry dates, we have to advise that our managers at sundry offices have been instructed by us to permit the necessary line connections between your exchange and his office; to receive and forward messages transmitted or delivered to him; to observe such rules and regulations respecting the business received by him from your exchange as your company may, from time to time, adopt, and communicate to him through us; to receipt for such messages as may be delivered by messenger, and keep such record of the business as will facilitate the calculation of the commissions due, and to extend to your exchange every facility for the verification of its records of the business thus transferred. He has also been instructed to pay over to your exchange, as soon after the first of each month as practicable (not later than the 10th), the full commission due to your
80 company on the business of the preceding month, as provided for by article 15 of the contract of Nov. 10, 1879.

Respectfully.

(S'd) J. B. VAN EVERY,
Act'g Vice-Pres't.

See list of dates and offices referred to above on other side hereof.

Galveston, Tex.	April 20.	Forms sent May 14, '81.
Houston, Tex.	April 20.	Forms sent July 15, '81.
Lockport, N. Y.	April 16.	Forms sent
Niagara Falls, N. Y.	April 19.	Forms sent Nov. 5, '81.
Nashville, Tenn.	April 20.	Forms sent Sep. 19, '82.
Richmond, Va.	May 6.	Forms sent
Natchez, Miss.	May 16.	Forms sent June 6, '81.
La Porte, Mich.	March 26.	Forms sent
Grand Haven, Mich.	March 10 and April 19.	Forms sent Sep. 22, '81.
Flint, Mich.	March 10 and April 19.	Forms sent
Ann Arbor, Mich.	March 10 and April 20.	Forms sent
Erie, Pa.	November 9 and April 2.	Forms sent May 14, '81.
Maquoketa, Ia.	January 11.	Forms sent July 1, '81.
Council Bluffs, Ia.	April 5.	Forms sent Aug. 2, '81.
Omaha, Neb.	Feb'y 28 and March 24.	Forms sent
Columbus, Ind.	April 5.	Forms sent June 14, '81.
Chillicothe, O.	December 23.	Forms sent July 8, '81.
Rushville, Ind.	March 26.	Forms sent June 14, '81.
Washington, Ind.	April 5.	Forms sent Aug. 10, '81.
Savannah, Ga.	Forms sent.	
Milledgeville, Ga.	Surrendered.	
Macon, Ga.	Forms sent.	
Columbia, S. C.	November 16.	
Charleston, S. C.	Forms sent.	
Augusta, Ga.	Forms sent Oct. 22, '81.	

22,170.

RICHMOND, VA., *Dec. 20th*, 1880.

Received from the American Bell Telephone Company the following instruments for use on a line connecting the office of the Western Union Telegraph Company with the telephone exchange at Richmond, Va.:

One transmitter, No. 6212.

One hand 'phone, No. R. 416.

Said instruments to remain the property of the American Bell Telephone Company and to be used only for the purpose of receiving and delivering telegraph messages.

(Signed) R. M. J. PAYNTOR,

Manager Western Union Telegraph Company.

"Bell Exhibit No. 10."

Statement Taken from Office Records of Southern Bell Telephone and Telegraph Co., Richmond, Va., Telephone Exchange.

Statement of amounts received from W. U. Telegraph Co. for telegrams received and delivered by telephone at Richmond, Va., to and from the W. U. Telegraph Co. since January 1, '94.

81

	Messages received by Western Union Telegraph Co. from telephones of the Southern Bell Tel. and Tel. Co.		Messages delivered from Western Union Tel. office in Richmond, Va., through telephones of the Southern Bell Tel. and Tel. Co. to its customers of the Richmond telephone exchange in Richmond, and to persons having telephones of said Southern Bell Tel. and Tel. Co. connected with the Richmond telephone exchange outside of said city of Richmond.	
1894.	Charges.	15 per cent. com.	No.	Com. at 2 cts. each.
Jan.	137 60	20 64	349	6 98
Feb.	119 95	17 99	277	3 54
Mar.	145 61	21 84	342	6 82
Apr.	154 62	23 19	246	4 92
May	132 48	19 87	261	5 22
June	154 13	23 12	307	5 14
July	134 71	20 21	291	5 82
Aug.	136 84	20 53	283	5 66
Sept.	137 19	20 58	291	5 82
Oct.	174 03	26 10	311	6 22
Nov.	130 44	19 57	261	5 22
Dec.	115 72	17 36	214	4 28
1895.				
Jan.	109 30	16 40	235	4 70
Feb.	136 40	20 46	281	5 62
May.	128 32	19 25	263	5 26
Apr.	135 22	20 28	312	6 24
May	134 02	20 10	318	6 36
June	182 54	27 38	369	7 38
July	154 17	23 13	344	6 88
Aug.	120 81	18 12	259	5 18
Sept.	160 98	24 15	311	6 22
Oct.	155 42	23 31	366	6 72
Nov.	142 53	21 38	281	5 62
Dec.	131 61	19 74	258	5 16
1896.				
Jan.	117 97	17 70	282	5 64
Feb.	119 93	17 99	284	5 68
Mar.	131 74	19 76	313	6 26
Apr.	127 88	19 18	304	6 08
May	147 48	22 12	293	5 86
June	147 13	22 07	282	5 64
July	112 76	16 91	279	5 58
Aug.	118 42	17 76	265	5 30
Sept.	92 00	13 80	249	4 94
Oct.	124 27	18 64	257	5 14
Nov.	130 77	19 62	231	4 62
Dec.	117 86	17 68	239	4 78
1897.				
Jan.	135 83	20 37	251	5 02
Feb.	126 70	19 00	289	5 78
Mar.	132 82	19 92	301	6 02
Apr.	124 64	18 70	266	5 32
May	134 84	20 23	263	5 26

82 I have examined the above statement in connection with the records in this office, and find the same correct, with the exception of some few trivial differences amounting to only a dollar or two one way or the other.

J. P. STITH,
Ch'f Cl'k W. U. Tel. Co.

Richmond, Va., June 30, '97.

"BELL EXHIBIT No. 11."

Those Bell Poles.

A communication addressed by Superintendent of Fire Alarm Thompson to Colonel McCluer, of the Bell Telephone Company, calling his attention to the fact that certain of the Bell Company's poles were in a dangerous condition, and the reply of the Bell Company to the same were read.

Mr. Bloomberg and Chairman Allen were of the opinion that *that* the street committee should refer the matter to the council without any recommendation, but Mr. Carter declared that the time had now arrived to take some decisive action to rid the streets of the Bell telephone poles.

The committee finally passed a resolution directing that the opinions of the city engineer and of the city attorney be obtained as to the best means of getting rid of the said poles.

This evidence is admitted as proving the substance of what took place before the committee on streets, but it is objected to by respondent as improper, irrelevant and immaterial.

"BELL EXHIBIT No. 12."

Just before the injunction was gotten in the case of The Southern Bell Telephone and Telegraph Company *versus* The City of Richmond, Va., the customers of said company were rapidly diminishing in numbers, and others were talking about giving up their telephones, and as soon as the injunction was granted new subscribers began to come in rapidly, and many parties who had given up their telephones had them put back, so that while at the time the injunction was granted there were only 878 telephones connected with the Richmond telephone exchange, there are now "1,150" telephones in use connected with said exchange. Just before the injunction was gotten numbers of people said that they would not con-

83 tinue to use the telephones of the Southern Bell Telephone and Telegraph Company, because they believed said company would be prevented from doing business in Richmond, and there was a great deal of talk to this effect.

Some of the subscribers in giving notice of intention to discontinue the telephones of said company, gave as a reason for giving up their telephones that the said company's franchise having been

revoked, the company could not continue to do business in Richmond.

After the time specified in the ordinance revoking the franchise of the Southern Bell Telephone and Telegraph Company had expired, and while routes were being laid out to be occupied by the Standard Telephone Company, I was told by W. H. Thompson, superintendent of the Richmond city fire alarm, that the Standard Telephone Company had been instructed to set their poles alongside of the poles of the Southern Bell Telephone and Telegraph Company, and that after this was done our poles would be chopped down unless we took them down ourselves.

R. B. HOOD,
Mgr. Richmond Telephone Exchange,
So. Bell Tel. & Tel. Co.

July 1, 1897.

STATE OF VA.,
City of Richmond, } *To wit:*

Personally appeared before me, Wm. E. Crawford, a notary public in and for the city aforesaid, in the State of Virginia, R. B. Hood, whose name is signed to the foregoing writing, and made oath that he is the manager of the *the* Richmond exchange of the Southern Bell Telephone and Telegraph Co., and that the facts contained in said writing are true.

Given under my hand this 1st day of July, 1897.

WM. E. CRAWFORD, *N. P.*

It is also true that previous to the obtaining of the injunction another telephone company called the Standard Telephone Company (afterwards known as the Richmond Telephone Company) had started in Richmond with, as it claimed, between eight hundred (800) and one thousand (1,000) subscribers, several hundred of whom were old subscribers of the Southern Bell Telephone and Telegraph Company, and that the new company only charged $24 (twenty-four dollars) for private residences and $36 (thirty-six dollars) for places of business in the city of Richmond, these being the annual rates of said new company, while the Southern Bell
84 Telephone and Telegraph Company had up to the time the new company was organized, charged sixty dollars ($60) for places of business and forty dollars ($40) for private residences, and on the first day of October, 1896, in order to meet the rates of the new company, said Southern Bell Telephone and Telegraph Company reduced its rates to thirty — ($30) for places of business and eighteen dollars ($18) for private residences.

R. B. HOOD,
Manager Richmond Telephone Exchange,
So. Bell Tel. & Tel. Co.

July 1, '97.

"BELL EXHIBIT NO. 13."

Mess. Leake & Carter, attorneys, city.

GENTLEMEN: I can testify very positively that during the summer and fall of 1894 intimations were several times given me by Col. Cutshaw and other municipal officers, whose names I cannot now recall, that if the Southern Bell Telephone and Telegraph Company did not concede the demands of the committee on grounds and buildings for free telephones for the city hall, that the company would either be subjected to a pole tax, which would cost considerably more than the free telephones, or that an effort would be made to revoke the municipal franchise.

This intimation was quite broadly given during my interviews with various city officials, whose names I cannot now recall, and in my letters to my executive officers I warned them that these threats would, I feared, be carried out unless the company met the demands of the city engineer and the committee on grounds and buildings.

Yours truly,

C. E. McCLUER,
Superintendent.

"BELL EXHIBIT NO. 14."

Stations outside of city of Richmond, Va., having telephones of Southern Bell Telephone and Telegraph Co. connected with Richmond telephone exchange.

Henrico Co., Va.	81
Manchester, Va.	73
Chesterfield Co., outside of Manchester, Va.	6
Hanover Co., Va.	4
King William Co., Va.	5
	169

R. B. R.

85 "BELL EXHIBIT NO. 15."

SUPERINTENDENT'S OFFICE,
WESTERN UNION TELEGRAPH COMPANY.

There is in the office of the Western Union Telegraph Company in Richmond, Va., three sets of 'phones received from the American Bell Telephone Company, which are now and have been for many years used for receiving and delivering messages from and to subscribers of the Southern Bell Telephone and Telegraph Company, which are sent to and received from points in and out of the State of Virginia and in foreign countries over the wires of the Western Union Telegraph Company and cables between the U. S. and Europe. These 'phones in the Western Union office in Richmond connect with all the 'phones of the Southern Bell Telephone and Telegraph Company used in and connected with its exchange in Richmond, and are operated as follows, to wit:

A subscriber of the Southern Bell Telephone and Telegraph Company who wishes to send a telegram over the Western Union lines calls up the Western Union office in Richmond through his 'phone; the clerk of the Western Union Telegraph Company at the 'phone in its office receives the message through the 'phone, puts it in writing and hands it to the operator of the Western Union Telegraph Company, who transmits it over the wires of the latter Co. to its destination.

When a telegram is received from a point outside of Richmond over the wires of the Western Union Telegraph Company to be sent to a subscriber of the Southern Bell Telephone and Telegraph Company, the Western Union telegraph operator who receives the message puts it in writing and hands it to the 'phone clerk of the latter company, who has charge of one of the 'phones in its office in Richmond, who calls up the person to whom the message is addressed over the 'phone and delivers it to them through the 'phone. Telegrams are thus delivered to a large number of subscribers of the Southern Bell Telephone and Telegraph Co., located in and outside of the city of Richmond, Va., but only to those subscribers who request delivery of telegrams by telephone. The 'phone clerk in the Western Union office goes on duty at 9 a. m. daily and attends to these 'phones continuously until 6 p. m. At that time until 2 a. m. the said 'phones in the Western Union office are operated by the regular receiving clerk of the Western Union Telegraph Company on the first floor of the office.

Over 50% of the telegrams thus sent and received through
86 these 'phones are messages to and from points outside the State of Virginia. A number of telegrams are sent through these 'phones from pay stations of the Southern Bell Telephone and Telegraph Co., in and outside of Richmond, connected with the Richmond exchange, by persons who are not subscribers of the Southern Bell Telephone and Telegraph Company.

Richmond, Va., June 30, '97. J. B. TREE, *Supt.*

"BELL EXHIBIT No. 16."

Subject: Study for long lines.

Southern Bell Telephone and Telegraph Company, 26 Cortlandt street.

Received July 16, 1895.

John E. Hudson, pres't.
James Merrihew, vice-pres't.
R. H. Rochester, treasurer.
Geo. H. Fearons, counsel.
D. I. Carson, sec'y and gen. supt.

NEW YORK, *July* 16, 1895.

C. E. McCluer, Esq., supt., Richmond, Va.

DEAR SIR: I wish you would buy one or two copies of the Rand & McNally pocket maps of Virginia and West Virginia and North

Carolina, and indicate thereon by red lines the result of a study by yourself and Mr. Rood of a comprehensive system of long lines for your district, which could join the second district system at Charlotte, and possibly Wilmington. I suggest Mr. Rood's co-operation, because I fancy from his knowledge of the country, he could take the map and make the first draft, thus saving you some time, showing the most desirable points to be connected up as terminals, and those to be reached en route. It might be well to make two alternative systems. In doing this work, I should ignore the proposed line of the long-distance company from Washington to Norfolk, and make your drawing as if we were to be the only builders. The probability is that when arrangements are completed for them to build, we shall have an opportunity to put onto their poles such lines as we desire for our local service. You would then, for example, show
a line from Alexandria, via Fredericksburg, to Richmond,
87 Petersburg and Norfolk, from Richmond to Lynchburg, Lynchburg to Charlotte, Raleigh to Wilmington, Raleigh to Greensboro, Danville to Winston, Lynchburg to Staunton and perhaps up the valley; Staunton to Charleston, Charleston to Huntington and Point Pleasant, &c., &c. Then make up a schedule, giving a list of the points connected, with the population of each place, number of exchange subscribers where there are exchanges, mileage between points and total mileage, average of mileage per exchange subscriber, average population per mile, based on total population of all points reached. My idea is to make an exhibit of such a system as we can conceive to be desirable, provided an unlimited supply of money was available to do the work. I shall be glad to have the results as early as convenient, and would like for you to give the whole matter as full and careful consideration as you can. This study will be of value for reference and further consideration.

Yours truly, D. I. CARSON, *Gen. Supt.*

Answered July 18, 1895.
R. B. R. July 29, 1895.
Answered Aug. 10, 1895.

EXHIBIT C. OF R. No. 1.

For this exhibit see page 46, the same having been filed with the answer of the City of Richmond.

EXHIBIT C. OF R. No. 2.

I, W. H. Thompson, the undersigned, have read so much of the affidavit made by Mr. R. B. Rood on July 1st, 1899, and filed in the suit of the Southern Bell Tel. & Tel. Co. *v.* City of Richmond, as refers to an alleged conversation with me. I did say to him that in some cases the Standard Telephone Company had been instructed to place their poles alongside of those of the Southern Bell Tel. & Tel. Co. But I never told him that after that had been done the

poles of the last-named company would be chopped or cut down, unless that company should take them down. I had no knowledge that would justify me in making such a remark.

W. H. THOMPSON,
Superintendent Fire-alarm Telegraph.

STATE OF VIRGINIA, }
City of Richmond, } *To wit:*

88 This day the above-named, W. H. Thompson, personally appeared before me, Ewd. J. Warren, a notary public for the city and State aforesaid, in my office in said city, and made oath that the above statement is true.

Given under my hand this, the 17th day of July, 1897.

EWD. J. WARREN,
Notary Public.

"EXHIBIT C. OF R. No. 3."

The following abstracts are from minutes of com. on streets:

DECEMBER 17TH, 1894.

From common council: An ordinance defining the manner of laying underground conduits, tubes or pipes for electrical conductors, cables and wires. Motion of Mr. Bloomberg to lay it on the table until next meeting, and that the telephone and telegraph authorities be invited to attend. Adopted.

DECEMBER 31ST, 1894.

The ordinance referred to the committee as to conduits, was read, and Mr. J. B. Tree, supt. Western Union Telegraph Co., made some remarks in regard to same.

On motion of Mr. King it was laid on the table.

On motion of Mr. Bloomberg that the ordinance as to underground conduits, tubes, &c., be taken up and the same be referred to city attorney and city engineer for such changes and suggestions as they may deem necessary, also to name such streets where it should be applicable. Adopted.

FEBRUARY 28TH, 1895.

By Mr. King: That the city attorney and city engineer prepare an ordinance as to telephones, routes and all restrictions, a general ordinance covering all questions of telephone and conduits. Adopted.

True copies from records of committee on streets.

FRANK T. BATES, *Clk.*

July 16, '97.

Statement of Agreed Facts.

1st. That the respondent, The City of Richmond, is a municipal corporation, chartered and existing under the laws of the State of Virginia, a citizen of the said State, having its principal office and

chief place of business within the territorial limits of the
89 county of Henrico, in the eastern district of Virginia, under the statute of Virginia, approved May 24th, 1870.

2nd. That the streets and alleys of the city of Richmond, which are occupied by the complainant company, are kept up and maintained at the expense of the respondent city as public highways, and are letter-carrier routes, established for the collection and delivery of United States mail matter.

3rd. That the 'phones of the plaintiff company connecting with its central office in said city and through said office with the other 'phones and stations of said company, are used by the officers of the United States for official and other communications at the two post-office stations in said city, at the United States Weather Bureau, at the office of the United States engineer for the improvement of James river, and at the custom house—all of said 'phones so used by the United States officials are in the city of Richmond, and are rented by the U. S. Government at the same rates as are charged to private persons, and on the same terms and conditions.

4th. The office of the Western Union Telegraph Company, in Richmond, connects by continuous wires with the offices of said telegraph company, in the District of Columbia, in every city and town of any size in every State of the United States and foreign countries, and receives and transmits messages to and from said cities, States and countries.

5th. That the plaintiff has had for more than ten years telephone plants and exchanges in all the large cities, and in many other places in the States of Virginia, West Virginia, North and South Carolina, Georgia, Alabama and Florida.

6th. That in July, 1895, the general superintendent of the complainant company wrote to Mr. C. E. McClure, its superintendent at Richmond, Virginia, the letter filed in this cause, marked "Bell Ex. No. 16," that Mr. McClure performed the work therein required, and in August, 1895, forwarded to Mr. D. I. Carson, said general superintendent, several very full and detailed estimates and schedules, as requested in said letter, and also returned the maps mentioned in said letter, having designated thereon as desired the system of long lines, suggested in said letter, to and from the places specified in said letter, some of which are within and some without the State of Virginia. Papers were also shown the attorney
90 for respondent city showing that a similar request had been made in April, 1894, by the said general superintendent to the superintendent of the Georgia, Alabama and Mississippi district to furnish similar estimates of a system of long lines to and from points within that district to and from points without the same for the purpose of telephonic communication with Richmond and other points, and it is admitted the said request was fully complied with. The said estimates, and schedules and maps, were shown to the attorney for the respondent, but it is agreed the same need not be filed.

7th. The allegations of fact made in the bill of complaint, not denied in the answer, and about which the answer neither pro-

fesses ignorance, nor calls for proof are admitted, unless disproved by evidence or the agreed facts.

9. Whenever 'phones are spoken of as the 'phones of the complainant, reference is had to the 'phones mentioned in Bell Ex. No. 5.

It is agreed that when any telegraph message is to be sent by any one by means of a 'phone of the complainant company over the wires of the Western Union Telegraph Company, the party desiring to send the message rings up over his 'phone the central office of the complainant company, which then connects his 'phone with the 'phone in the telegraph office, and thus delivers the message to be sent over the telegraph wires.

When a telegraph message received over the wires of the Western Union Telegraph Company is to be delivered by a telephone of the complainant company, the operator of the telephone in the office of the telegraph company calls up the central office of the complainant, and, having been put in connection with the person for whom the telegraph message is intended, delivers the message over the telephone wires of the complainant company.

This method of communication between the said 'phones in the telegraph office of the city of Richmond and those outside of the telegraph office is exactly the same in use between other 'phones of the said complainant company in said city.

THE COMPLAINANT,
By LEAKE AND CARTER,
STILES & HOLLADAY.
CITY OF RICHMOND,
By C. V. MEREDITH.

91 *Decree.*

Entered Aug. 23, 1887.

THE SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY
vs.
THE CITY OF RICHMOND.

The court, without passing on the rights claimed by the complainant company under the laws of Virginia and the ordinances of the city of Richmond, is of opinion and doth adjudge, order and decree, that the complainant company has, in accordance with the terms and provisions and under the protection of the act of Congress of the United States approved July 24th, 1866 (which is an authority paramount and superior to any State law or city ordinance in conflict therewith) the right "to construct, maintain and operate its lines over and along" the streets and alleys of the city of Richmond, both those now occupied by the complainant company and those not now so occupied, and to put up, renew, replace and repair its lines, poles and wires over and along said streets and alleys as well as to maintain, construct and operate the same and to connect its lines with new subscribers along said streets and alleys, and the said

city of Richmond, its agents, officers and all others are enjoined and restrained from cutting, removing, or in any way injuring said lines, poles and wires of the complainant company, and from preventing or interfering with the exercise of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising its said rights.

And the court doth adjudge, order and decree that the defendant do pay to the complainant its costs in this suit incurred to be taxed by the clerk, and this cause is ordered to be removed from the docket and placed among the ended causes, but with liberty to either party hereto on ten days' notice to the other to reinstate this cause on the docket of this court, on motion, for the purpose of enforcing and specifically defining, should it become necessary, their respective rights under this decree.

NATHAN GOFF,
U. S. Circuit Judge.

August 23, 1897.

92 *Order.*

Entered Aug. 28, 1897.

SOUTHERN BELL TEL. & TEL. CO.
vs.
CITY OF RICHMOND.

This day came The City of Richmond by counsel and moved the court to modify its decree in this cause of August 23, 1897, by inserting therein after the words "construct and operate the same," the following words, to wit: "so far as to receive from and deliver to the Western Union Telegraph Co. messages sent from beyond the limits of the State of Virginia, or to be sent beyond the said limits," and by inserting therein after the words, "interferring with the exercise of the aforesaid rights by the complainant company," the following words, to wit: "so far as the reception from and delivery to the Western Union Telegraph Company of any message sent from beyond the limits of the State of Virginia, or to be sent beyond said limits," but the counsel for the complainant objected, and the court intending by said injunction to enjoin the city from interferring with the local business and messages, as well as those of an interstate character, doth decline and refuse to so modify said decree.

NATHAN GOFF,
U. S. Circuit Judge.

August 28, 1897.

Petition for Appeal and Assignment of Errors.

Filed Aug. 28, 1897.

In the Circuit Court of the United States for the Eastern District of Virginia.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, Complainant,
vs.
CITY OF RICHMOND. } In Equity.

To the honorable the judges of the circuit court of United States for the eastern district of Virginia:

The petition of The City of Richmond, respondent in the cause aforesaid.

Your petitioner respectfully represents that, by a decree of your honorable court, dated August 23rd, 1897, and made and
93 filed in the cause aforesaid, it was adjudged and decreed that The Southern Bell Telephone and Telegraph Company, complainant as aforesaid, "has, in accordance with the terms and provisions, and under the protection of the act of Congress of the United States, approved July 24th, 1866 (which is an authority paramount and superior to any State law or city ordinance in conflict therewith), the right 'to construct, maintain and operate its lines over and along' the streets and alleys of the city of Richmond, both those now occupied by the complainant company and those not now so occupied, and to put up, renew and repair its lines, poles and wires over and along said streets and alleys, as well as to maintain, construct and operate the same and to connect its lines with new subscribers along said streets and alleys, and the said city of Richmond, its agents, officers and all others are enjoined and restrained from cutting, removing or in any way injuring said lines, poles and wires of the complainant company, and from preventing or interfering with the exercise of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising the said rights, and that the defendant do pay to the complainant its costs in this suit incurred to be taxed by the clerk."

Your petitioner represents that it feels itself to be aggrieved because of errors in the record and proceedings on which said decree was founded, and because of errors in said decree. The said respondent, therefore, prays that it may be allowod an appeal in the United States circuit court of appeals for the fourth circuit upon said decree, in order that said decree may be reviewed and reversed by said court, and that the proper citation may be issued and served upon the complainant, and the record of the proceedings in this cause may be transmitted to said United States circuit court of appeals, and that your petitioner, therefore, prays that your honor will prescribe the amount of bond to be given by it.

Your petitioner files herewith the following assignment of errors, which it asserts exist in said record, proceedings and decree, and which are intended to be urged in the said United States circuit court of appeals for the fourth circuit.

Assignment of Errors.

First. The said circuit court erred in entering the preliminary restraining order against your petitioner, entered October 6, 1896.

Second. The said circuit court, upon hearing said de-
94 murrer, erred in not sustaining the same and in not ordering the said bill of complaint to be dismissed.

Third. The said circuit court erred in overruling the demurrer, filed Nov. 16, 1896, by your petitioner as respondent to a bill of complaint filed in this cause by the Southern Bell Telephone and Telegraph Company, and in entering the decree of the — day of March, 1897, continuing said injunction until final decree should be entered in this cause.

Fourth. That the court erred in said final decree of August 23rd, 1897, in failing to pass upon the effect had upon the alleged rights of the complainant by the statute of Virginia, referred to in said bill of complaint, and the ordinance of the city of June 26th, 1884, offered as an exhibit and as evidence in this cause, under which it began its operation in the said city of Richmond, and under which it was operating up to the time of the passage of the city ordinance, approved December 14, 1894, and filed in this cause, because it plainly appears from said ordinances that the complainant had, from the time it began operations in said city of Richmond, and under which it was operating up to the time of the passage of said ordinance of December 14th, 1894, a contract with said city, by which the complainant agreed to cease its operations upon the streets and alleys of the said city whenever required, as set forth in the 5th section of the ordinance of June 26th, 1884, and because it had been so required to cease its operations by said ordinance of December 14th, 1894.

Fifth. That there is error in said final decree because a telephone company is not a telegraph company, and is not embraced in the terms of the act of Congress, approved July 24th, 1866.

Sixth. That there is error in said final decree, because if said act of Congress, approved July 24, 1866, does embrace telephone companies at all, it only embraces such as do an interstate business, and only to the extent of its interstate business, while it plainly appears from the pleadings and evidence in this cause that the complainant does not do an interstate business, but only a local business.

Seventh. There is error in said final decree, because if said act of Congress, approved July 24th, 1866, does embrace telephone companies at all, it only embraces such as do interstate business, and to the extent of its interstate business, and it plainly appears
95 from the pleadings and evidence in this cause that, if the complainant does an interstate business at all, it also does a

purely local business; yet in the decree no such distinction is recognized, and your petitioner is enjoined from interfering with the business of the company, even as to messages sent from one point in the State to another, and even from one point in the city to some other point in its limits.

Eighth. That there is error in said final decree, because the evidence plainly shows that there never was any contract directly or indirectly between the complainant company and the Western Union Telegraph Company, which made, or tended to make, the telephone business of the complainant company, or any part of said business, interstate commerce, or come within the terms or protection of section 8, article 1 of the Constitution of the United States as to commerce "among the several States."

Ninth. That there is error in said final decree, because the evidence plainly shows that if there ever was any contract between the complainant company and the Western Union Telegraph Company, which made or tended to make, the telephone business of the complainant company, or any part of said business, of such a nature as to come within the term- or protection of section 8, article 1, of the Constitution of the United States, as to commerce "among the several States," such contract ended on the 1st day of November, 1896.

Tenth. That there is error in said final decree, because even if the pleadings and evidence show that there was a contract between the complainant company and the Western Union Telegraph Company, which made the telephone business of the complainant company, or any part of said business, interstate commerce, or brought it within the terms or purview of section 8, article 1, of the Constitution of the United States as to commerce "among the several States," and that such contract was still in force at the time of the entering of said final decree, yet the said circuit court should not have entered its said final decree in such terms as it has done, so as to enjoin the city from interfering with the business of the company, even as to messages sent from one point of the State to another, or even from one point in said city to some other point in its limits.

Eleventh. That there is error in said final decree, because it gives the complainant an unrestricted right to erect poles anywhere in said city without being subject to the ordinance of the city
96 approved September 10, 1895, filed as Exhibit "G" with the bill of complaint, or any of its provisions, or any other regulation which may be hereafter ordered by the city authorities.

Wherefore, because of the errors aforesaid, your petitioner prays that said decree may be reviewed and reversed by said United States circuit court of appeals.

All of which is respectfully submitted.

CITY OF RICHMOND,
By C. V. MEREDITH, *City Att'y.*

Order Allowing Appeal.

Entered Aug. 28, 1897.

In the Circuit Court of the United States for the Eastern District of Virginia.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, Complainant,
vs.
CITY OF RICHMOND, Respondent.
} In Equity.

Ordered this 28th day of August, in the year 1897, that the appeal prayed in the above petition be granted, and that a proper citation be issued and served upon the complainant as prayed.

The amount of the appeal bond for the city of Richmond is fixed at $300.00.

NATHAN GOFF,
Judge Circuit Court of the U. S. for the Eastern District of Virginia.

Appeal Bond.

Filed Aug't 28, 1897.

Know all men by these presents, that we, The City of Richmond, as principal, and C. V. Meredith, as surety, are held and firmly bound unto the Southern Bell Telephone and Telegraph Company in the full and just sum of three hundred dollars ($300.00), to be paid to the said Southern Bell Telephone and Telegraph Company, its certain attorneys or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of August, 1897.

97 Whereas, at the circuit court of the United States for the eastern district of Virginia, in a suit lately depending therein in equity between The Southern Bell Telephone and Telegraph Company, complainant, and The City of Richmond, respondent, a decree was entered on the 23rd day of August, 1897, perpetually enjoining and restraining the city of Richmond from cutting, removing or in any way injuring the lines and poles of the complainant company and from preventing and interfering with the right of the said company to construct, maintain and operate its lines along and over the streets and alleys of the city of Richmond, both those now occupied by the complainant company and those not now so occupied, and to put up, renew, replace and repair its lines and poles over and along said streets and alleys, as well to maintain, construct and operate the same, and to connect its lines with new subscribers along said streets and alleys, and from taking any proceedings to inflict and enforce fines and penalties on said company

for exercising its said rights, and that the said respondent do pay to the complainant its costs in this suit incurred.

And whereas the said city has prayed an appeal to the United States circuit court of appeals for the fourth circuit, and the same has been allowed and a citation has been issued, directed to the Southern Bell Telephone and Telegraph Company, citing and admonishing it to be and appear at the said circuit court of appeals, to be held at the city of Richmond, in the State of Virginia, on the day in said citation mentioned.

Now, therefore, the condition of the above obligation is such that if the said city of Richmond shall prosecute its appeal with effect and shall pay and answer all the costs in the proceedings in said cause, if it shall fail to make good its appeal, then the above obligation to be void, otherwise to remain in full force and effect.

CITY OF RICHMOND, [SEAL.]
By C. V. MEREDITH.
C. V. MEREDITH. [SEAL.]

Approved:
NATHAN GOFF,
U. S. Circuit Judge.

August 28, 1897.

98 *Citation.*

Filed Aug. 28, 1897.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Southern Bell Telephone and Telegraph Company, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the fourth circuit, to be holden at Richmond on the 2nd day of November next, pursuant to an appeal from a decree of the circuit court of the United States for the eastern district of Virginia, in your favor, passed in a cause in said court wherein The City of Richmond is respondent and you are complainant, to show cause, if any there be, why the decree rendered against the said city of Richmond in said cause mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Nathan Goff, judge of the circuit court of the United States, this 28th day of August, in the year of our Lord one thousand eight hundred and ninety-seven.

NATHAN GOFF,
U. S. Circuit Judge.

We accept legal service of the within.

LEAKE & CARTER.
STILES & HOLLIDAY.

Stipulation by Counsel as to Record.

Filed Sept. 10, 1897.

In accordance with the agreement set forth in the statement of evidence filed by counsel for the several parties in the court below, it is agreed, as to the papers filed in evidence by the complainant, marked "Bell Ex., No. 4," and "Bell Ex., No. 5," only the following portions are to be copied:

From "Bell Ex., *Fo.* 4," copy on page 22, from and including the words "This agreement," down to subdivision 2 of article 1; on page 23, copy subdivision 1, article 2; on pages 33 and 34, article 6; on page 34, article 7; on pages 44 & 45 copy subdivision 2 of article 12, and subdivision- 1 & 2 of article 13; on pages 47 & 48 copy subdivisions 1 & 2 of article 14; on pages 48, 49, 50, 51, 52 & 53 copy subdivisions 1, 2, 3, 4, 5, & 6 of article 15, and articles 17, 19 & 20. And it is agreed that no more of said exhibit be copied, as the rest does not pertain to the matters here at issue.

99 & 100

As to "Bell Ex., No. 5," it is agreed that the said paper, beginning with the words "This agreement," down to subdivision C, in article 2, shall be copied; and also subdivision D, of article 2; also the paper headed "Contract for exchanges." "Form 109 D" shall be copied from the words "This agreement," including therein said words down to article 5; and also that articles 7 and 9 shall be copied; and also so much of article 11 as begins with the words "Touching the lines," down to the words "The following erasures;" and also so much of the paper headed "Contract for extraterritorial lines, form 113 D," as is included between the words, including said words therein, "This agreement" and the word "witnesseth," and article 3 thereof. No more need be copied.

It is further stipulated that neither the original summons nor the injunction bond need be printed.

SOUTH. BELL TEL. & TEL. CO.,
By STILES & HOLLADAY.
CITY OF RICHMOND,
By C. V. MEREDITH.

Clerk's Certificate.

THE UNITED STATES OF AMERICA, }
Eastern District of Virginia. }

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, do hereby certify that the foregoing is a true transcript of the record in the cause in the caption mentioned, as agreed upon by counsel in a stipulation filed in the papers of this cause and made a part of the record.

Seal of the Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of my said court, at Richmond, in said district, this 10th day of September, 1897.

M. F. PLEASANTS, *Clerk.*

101 *Proceedings in the United States Circuit Court of Appeals, Fourth Circuit.*

CITY OF RICHMOND, Appellant, *vs.* SOUTHERN BELL TELEPHONE AND Telegraph Company, Appellee.	No. 241. Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Richmond.

September 14, 1897.—Transcript of record filed. Same day appearance of Charles V. Meredith, Esquire, for the appellant.

Same day twenty copies of the printed record filed.

September 20, 1897.—Appearance of Leake & Carter, Esquires, and Stiles & Holladay, Esquires, for the appellee.

At the November term, 1897, to wit: November 12, 1897, the cause came on to be heard on the transcript of the record, and was argued by counsel and submitted.

At the February term, 1898, to wit: February 1, 1898, the court here announced and filed its opinion, which is as follows, to wit:

102 *Opinion.*

United States Circuit Court of Appeals, Fourth Circuit.

CITY OF RICHMOND, Appellant, *versus* SOUTHERN BELL TELEPHONE AND Telegraph Company, Appellee.	No. 241. Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Richmond.

Argued Nov. 12, 1897; decided Feb. 1, 1898.

Before Simonton, circuit judge, and Brawley and Purnell, district judges.

Charles V. Meredith, for appellant; Hill Carter, of Leake & Carter, and A. L. Holladay, of Stiles & Holladay, for appellee.

SIMONTON, *Circuit Judge:*

This case comes up on appeal from the decree of the circuit court of the United States for the eastern district of Virginia.

The complainant is a corporation organized under the laws of the State of New York as a telephone and telegraph company. It is engaged in the business of a telephone company and of constructing and operating telephone lines in and through the States of Virginia, West Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida. It has maintained and operated for several years all the apparatus necessary for transmitting telephone messages in the city of Richmond, Virginia, and has erected and maintained along certain streets and alleys of said city numerous poles and wires for this purpose.

The complainant company was incorporated on the 11th Decem-

ber, 1879. In 1884 it applied to the city of Richmond for authority to erect its poles and run its wires along the streets and alleys of said city; and by an ordinance passed 21st June, 1884, this permission was granted as to such routes as may be specified and agreed
103 on by a resolution or resolutions of the committee on streets, from time to time, and on the conditions and provisions of the ordinance. These conditions and provisions were: that on any route conceded by the committee on streets and accepted by the company, the poles should be so placed by the company under the direction of the city engineer as to allow for the use of said poles by the fire alarm and police telegraph, in all cases giving the choice of position to the city's wires. To furnish telephone service to the city at a special reduction of $10 per year for each station. No shade trees to be disturbed, cut or damaged without the permission of the city engineer and the consent of the owners of the property in front of which the trees stand. All this work to be in every respect subject to the supervision and control of the city engineer. The ordinance to be subject at any time to repeal, such repeal to go into effect twelve months after the passage of the repealing ordinance.

On the 13th February, 1889, The Southern Bell Telephone and Telegraph Company, the complainant, accepted without reservation all of the restrictions and obligations of the act of Congress, approved 24th July, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes."

And thereupon, on 18th February, 1889, the Postmaster General certified that this acceptance was on file in the Post-office Department. This act of Congress is in these words:

"SECTION 5263. Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been, or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads."

"SECTION 5268. Before any telegraph company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by law."

104 On 14th December, 1894, the city council of Richmond repealed the ordinance of 26th June, 1884, granting these privileges to the Southern Bell Telephone and Telegraph Company, to take effect twelve months after its approval. And 10th September, 1895, the same city council passed another ordinance as to the joint use of poles erected in the streets and alleys of the city of

Richmond, for the support of wires used in connection with the transmission of electricity.

The first section of this ordinance provides that all poles now erected in the streets or alleys of the city of Richmond for electric wires, except such as support wires required by city ordinances to be removed and run in conduits, shall thereafter be allowed to remain only on terms and conditions thereinafter set forth.

The second section provides that no pole now erected for the support of telephone wires shall remain on any street in said city after 15th December, 1895, unless the owner or user of such pole shall first have petitioned for and obtained the privilege of erecting and maintaining poles for telephone purposes in accordance with the conditions of this ordinance and such others as council may see fit to impose. If such owner fail to obtain such privilege and fail or neglect to remove the poles and restore the street to its former condition, he shall be liable to a fine not more than $500, and not less than $100, for every pole so remaining. Each day's failure to be a separate offence. Then follows a number of sections imposing most stringent conditions, placing the whole matter within the control of the city and its officers; reserving the right in the city council at any time to put other restrictions and regulations as to the erection and use of such poles, and from time to time to require the removal of them and the wires to be run in conduits. On 10th September, 1895, another ordinance was passed requiring the removal of poles and wires from overhead in certain streets and for the construction and using conduits in certain streets. This ordinance was enforcible under heavy penalties, with the provision also that any company getting the privilege of putting in these conduits, must make them 100 per cent. larger than is needed for their use, so that the city might run its wires free in such conduits and any other company may use them for an agreed compensation, or one to be fixed by arbitrators.

Threats having been made to carry these ordinances into effect, the complainant filed its bill praying an injunction. It rests its right to use the streets and alleys of the city of Richmond for the purposes of its business under article I, section 8 of the Con-
105 stitution of the United States, and the act of Congress of 1866, and denies that in such use it can be prevented or controlled or be in any way dependent upon an ordinance or any ordinances of the city council.

The prayer for an injunction is in these words:

"That said city and all others, its agents and employees, may be restrained and enjoined from removing or interfering with its poles and wires in said city, and from interfering with the right of your orator to use said poles and wires, and that all proceedings by said city or its agents and all others to prevent your orator from continuing, renewing, repairing and extending its lines, wires and poles in, along and over the streets and alleys of the said city, and to inflict fines and penalties on your orator for so doing, may be restrained and enjoined; that the right of your orator to use said poles and wires and to carry on its said business along and over

the streets of the said city be declared and defined; that the ordinances of said city of the 14th of December, 1894, and of the 10th September, 1895, so far as they undertake to prevent your orator from maintaining and using its lines, poles and wires over and along the streets and alleys of the city of Richmond, from repairing, renewing and extending its said poles, wires, lines and routes as its business may require, may be declared null and void."

Upon the filing of the bill an interlocutory injunction was granted.

The bill was first met by demurrer. The demurrer sets up these defences:

1. As to the equity of the bill.
2. That the act of Congress of 1866, applies only to telegraph companies and not to companies like the complainant.
3. That the act of Congress, even if it does apply to complainant does not give it any right to erect its poles and wires along the streets of Richmond, without the consent of the city, subject to reasonable regulations as to the routes, position and number of the poles and to pay for use of the streets.
4. That if this is the effect of the act of Congress, it is unconstitutional.
5. That the ordinance of 1884, constitutes a binding contract between complainant and the city of Richmond, with a power
106 of re-cission by repeal in the city council. That this power was given by the statute of the State of Virginia and was properly exercised.

The demurrer was overruled and the defendant filed its answer. The portions of this answer which bear upon the conclusions reached in this case are these: A denial that the wires, poles and lines of the complainant in and over the streets and alleys of said city, constitute a part of the postal service of the United States. A denial that complainant is a telegraph company and a denial that its acceptance of the act of 1866, so far as the telephone exchange in Richmond is concerned, even entitled it to any of the rights and powers authorized by the act. A denial that the acceptance by the complainant of the provisions of the act of 1866, has rendered complainant independent of and superior to the council of the city of Richmond.

The cause came to a full hearing and the circuit court made the following decree:

"The court, without passing on the rights claimed by the complainant company under the laws of Virginia, and the ordinances of the city of Richmond, is of opinion and doth adjudge, order and decree that the complainant company has, in accordance with the terms and provisions and under the protection of the act of Congress of the United States, approved July 24th, 1866, (which is an authority paramount and superior to any State law or city ordinance in conflict therewith) the right 'to construct, maintain and operate its lines over and along' the streets and alleys of the city of Richmond, both those now occupied by the complainant company, and those not now so occupied, and to put up, renew, replace

and repair its lines, poles and wires over and along said streets and alleys, as well as to maintain, construct and operate the same and to connect its lines with new subscribers along said streets and alleys, and the said city of Richmond, its agents, officers and all others are enjoined and restrained from cutting, removing, or in any way injuring said lines, poles and wires of the complainant company, and from preventing or interfering with the exercise of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising its said rights."

The defendant obtained leave to appeal from this decree, and it comes up on the assignments of error. These are eleven in
107 number. The first three are general in their character, going to the preliminary injunction and to the demurrer to the bill.

The fourth is to the effect that the ordinance of 1884, passed under the authority of the State of Virginia, and under which the operations of the complainant company were begun and continued, created a contract which bound the complainant to cease its operations upon the streets and alleys of Richmond whenever the city council exercised its right to repeal said ordinance, a right reserved in the ordinance itself.

The fifth and sixth deny that the complainant has any right to the privileges under the act of Congress of 1866, which applies to telegraph companies, and not to a telephone company as complainant is.

The seventh, eighth and ninth deny that even if complainant comes within the act of 1866, it can be protected, unless it is engaged in interstate commerce business; and only as to such business, and denies that it is protected in its local business. They also deny that there is anything in the contract with the Western Union Telegraph Company which puts complainant in interstate commerce business, or within the protection of section 8, article I, of the Constitution of the United States.

The tenth and eleventh assignments assign error as to the scope of the injunction, as it enjoins the city from interfering with the *infra* State and local business of the complainant, and a right to erect its poles and stretch its wires, without any control on the part of the city.

At the bar the appellant declared that the constitutionality of the act of Congress of 1866, was recognized and admitted.

That all streets which are letter-carrier routes are post-roads of the United States.

That under the act of 1866, a telegraph company can obtain a right of way for its poles and wires through a city and along its streets, against the wish of the municipality.

The decisive questions raised in this case are :

First. Does the complainant come within the protection, and is it entitled to the privileges contained in the act of Congress of 1866?

Second. If it comes within the provisions of that act, how far has

it limited and restricted itself by accepting the provisions of the ordinance of the city of Richmond?

Third. To what extent does the protection of the act of 1866 go? Does it make the company accepting it free of the control of the municipality in which it does business?

108 1.

The act of Congress of 1866, in terms, speaks of telegraph companies. Do these words include telephone companies?

The telegraph and telephone both communicate messages by means of electricity over wires, for longer or shorter distances. The telegraph communicates these messages by sound of instruments, the telephone by the human voice usually. Both depend upon electricity for their action. Each is but a form of use—the product and result of the same principle. The names are only used to distinguish the method of communication.

In England, in the case of *Attorney General vs. Edison Telephone Co.*, 6 Q. B. Div., 244, Stephens, J., in a carefully prepared and elaborate discussion, says: "I do not think it necessary to express any opinion on a controversy which is more scientific than legal, and perhaps more properly metaphysical or relative to the meaning of words than scientific, as it seems to turn upon the nature of identity in relation to sound. It is enough to say that, whatever be the merits of the controversy, it does not appear to us that the fact, if it is a fact, that sound itself is transmitted by the telephone, establishes any material distinction between telephonic and telegraphic communication, as the transmission, if it takes place, is performed by a wire acted on by electricity."

In the *Wisconsin Telephone Co. vs. City of Oshkosh*, 62 Wis., 32, this case was cited with full approval, and the doctrine asserted that, in contemplation of law, a telephone and telegraph company are one and the same. In the case of the *Chesapeake & Potomac Telegraph Co. vs. B. & O. Telegraph Co.*, 66 Maryland, 410, the court of last resort of that State quote with approval the English case above quoted, and say farther: "It is clear if we take the term telegraph to mean and include any apparatus or adjustment of instruments for transmitting messages or other communications by means of electric currents and signals, that term is comprehensive enough to embrace the telephone."

The same doctrine is clearly and fully expressed in *Duke vs. Central N. J. Telephone Co.*, 53 N. J. Law Reports, 341. The court quotes the language of Bell in his application for a patent, set out in the *Telephone Cases*, 126 U. S., 1. He says: "What I claim is the method or an apparatus for transmitting vocal or other sounds telegraphically as herein described, by causing electrical undulations similar in form to the vibrations of air accompanying said vocal sounds."

109 And so also Brown, J., now Mr. Justice Brown, in *Cumberland Telephone and Telegraph Co. vs. United Electric Railway Co.*, 42 Fed. Rep., 273, says: "We see no reason to doubt the posi-

tion assumed by the complainant that a telephone company is a telegraph company."

The complainant, therefore, comes within the protection, and is entitled to the privileges, of the act of 1866.

2.

The next question is, if the complainant is within the protection and enjoys the privileges of the act of Congress of 1866, how far has it limited and restricted itself by accepting the provisions of the ordinance of the city of Richmond.

In June 1884, the ordinance was passed granting the right of way throughout the city of Richmond to this complainant. At that time it had not accepted the provisions of the act of 1866, and in no other way could it get the right to enter the city but by permission of the city council. The permission was given subject to the right of the city council to revoke it at any time after twelve months, and on 14th December, 1894, it was revoked. In the meantime, 1889, the complainant, recognizing the uncertainty of its tenure, concluded to put the enjoyment of its rights on higher grounds, and unner paramount authority. Can it now be said that the complainant cannot avail itself of the privileges of the act of 1866, and must look for them to the city council, because formerly the city granted privileges which it has revoked? Can a contract, revocable and revoked by one party, still bind the other party after its revocation?

The complainant is not now using the post-roads of the city of Richmond under any grant from the city council. The council themselves, by their own act, have put an end to any such contract with the complainant. But for the act of Congress, it would be a trespasser on these post-roads. Under the act of Congress, it has the right to construct, maintain and operate lines of telegraph over and along any of the post-roads of the United States, and when an effort is made, or threatened, to deal with it as a trespasser, it can refer to that act.

3.

The next question is: To what extent does the protection of the act of Congress go? Does it free the company accepting its provisions from any control of the mun-cipality through whose streets it may go?

110 This act of 1866 authorizes the company accepting its provisions to maintain and operate its lines on any post-road. The act itself prescribes a condition. The lines of telegraph must not interfere with the ordinary travel. It is, therefore, subordinate to the public use. The privileges of this act, "like any other franchise, are to be exercised in subordination to public as to private rights." (*St. Louis vs. Western Union Telegraph Co.*, 148 U. S., 100.) These privileges must be enjoyed, subject to the lawful exercise of the police power. In *Western Union Telegraph Company vs. Massachusetts*, 125 U. S., 530, a telegraph company, protected by the act of 1866, and engaged in business as a common carrier, was held to

be a subject of taxation by a State. The Supreme Court uses this language: "It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered."

In the case of *St. Louis vs. Western Union Telegraph Company, supra*, a charge by a city for poles was held valid against this same company, the only limitation being that the charge be not unreasonable. In *Western Union Telegraph Company vs. The Mayor*, 3 Law Reports Ann., 449, an ordinance requiring that telegraph wires be placed in conduits was sustained. Streets and alleys in a city are the public property placed under the supervision and control of the mun-cipality, the representative of the sovereign power. They exercise this supervisions and control for the benefit of the whole public, those living upon and those passing through such streets and alleys. And in the exercise of this supervision, which is the police power, they must see to it that the rights of the public and of private persons are not infringed.

The complainant, under the act of Congress, has the right to use these highways. Neither the State nor any mun-cipality can prevent it. But this use must be subordinate to the rights of the public, must not endanger those rights. And as the municipality is the guardian of the public in this regard, it can establish such lawful provisions as may regulate the use, always, however, avoiding such regulations as will make the use burdensome and intolerable, and so practically impossible. (*City of Philadelphia vs. Western Union Telegraph Company*, 82 Fed. Rep., 797.)

This being so, the injunction granted by the circuit court is
111 too broad in its language and effect. There should have been the recognition of a proper exercise of the police power by the municipal corporation, and the use by the complainant of its poles and lines should have been declared to be subject to such regulations and restrictions as may now or may be hereafter imposed by the city council of Richmond, in the proper and lawful exercise of the police power.

The only remaining question is, do the ordinances of city of Richmond prescribe regulations which will make the use burdensome and intolerable, and practically impossible?

"It belongs to the legislature to exercise the police power of the State, subject to the power of the courts to adjudge whether any particular law is an invasion to rights secured by the Constitution." (*Mugler vs. Kansas*, 123 U. S., 623) "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business of or impose unusual and unnecessary restrictions upon lawful occupations. In other words its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts." (*Lawton vs. Steele*, 152 U. S., 137.) If this be the case with regard to the

legislature, *a fortiori* it applies to a municipal corporation, the creature of the legislature.

On examination of these ordinances it will be seen that as a condition precedent to the use of the streets of Richmond, a petition must first be filed for the purpose of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of that ordinance, and such other conditions as the council may see fit to impose. (Ordinance approved 10th September, 1895.) The 7th section of this ordinance expressly reserves to the city council the right to put at any time other restrictions and regulations. And the whole tenor and effect of the ordinance is to put the company absolutely under the control of the city. And the terms of the ordinance are enforcible under heavy penalties. The next ordinance, the one providing for wires in conduits, after providing that the city council may compel the removal of wires from poles overhead in certain streets and the putting them in conduits in certain streets, under a penalty of not less than $100 or more than $500 for each pole per week, provision is made for permission to build conduits of sufficient capacity to accom-odate the wires in such streets and to provide for an increase thereof to at least the extent of 100 per cent., the increase of space not to
112 be occupied by the party building the conduits without the consent of the council, the conduit to be used for the wires of the council free, and the city council to allow any other person or corporation to use such conduits for wires upon paying compensation in the mode prescribed by the city council. This privilege of building and owning conduits to last no longer than fifteen years, at the end of which time the city may put such other restrictions, conditions and charges as it may see fit, or may order their removal at the expense of the owner. The charge for using or owning any wire in any such conduit shall be for each year until January 1, 1900, $2.00 per wire per mile. After January 1, 1900, such larger compensation for the rest of the term as the city council may see fit. These are some of the conditions now imposed, with the right to impose any others which council may see fit. Now it goes without saying that if the complainant, notwithstanding its claim of protection under the act of Congress of 1866, were willing to file a petition to the city council for the privilege of using its streets and alleys, and in that petition agreed, in consideration of its grant, to abide by any present or future condition, regulation or restriction the council may impose, this would be a binding contract and would control the complainant. *R. R. Co. vs. Ryan*, 153 U. S., 436. Whatever the rights of the complainant may have been under such a stipulation, it would surrender them and come within the absolute domination of the city council. The courts could not review any ordinance to discover if it be within the lawful exercise of the police power, for the complainant would be bound by its contract to obey the ordinance, be it a police regulation or not.

These conditions, regulations and restrictions already prescribed by the city council appear to be stimulated by a desire to oppress

and control, perhaps defeat, the existence of the complainant and so are not the lawful exercise of the police power.

Let the case be remanded to the circuit court with instructions to modify the terms of the injunction therein granted, so that it may conform to the principles declared in this opinion, the costs of the case to be equally divided between the parties.

BRAWLEY, *District Judge*:

I concur in the result, but am not inclined to assent to so much of the opinion as holds that a telephone company, such as is
113 described in this case, and whose business is local in character, is within the purview of the act of Congress of July 14, 1866, relating to telegraph companies.

At the same term, to wit: February 5, 1898, the court here made and entered the following decree, to wit:

Decree.

United States Circuit Court of Appeals, Fourth Circuit.

CITY OF RICHMOND, Appellant, *vs.* SOUTHERN BELL TELEPHONE AND Telegraph Company, Appellee.	No. 241. Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the motion made by the appellee at the last term of this court (before the case was heard) to dismiss this appeal and case, because said appeal should have been taken to the Supreme Court of the United States, and not to this court, be, and the same is hereby overruled; and that the decree of the said circuit court, in this cause, be, and the same is hereby, reversed and this cause is remanded to the circuit court of the United States for the eastern district of Virginia, at Richmond, with instructions to modify the terms of the injunction therein granted so that it may conform to the principles declared in the opinion of this court.

It is further ordered that each side pay their own costs incurred in this court.

It is further ordered that the mandate of this court issue after the expiration of twenty days from the date hereof.

CHARLES H. SIMONTON,
Circuit Judge.

February 5, 1898.

114 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the aforegoing is a true

copy of the entire record in the therein-entitled cause as the same remains upon the records and files of the said circuit court of appeals.

Seal United States Circuit Court of Appeals, Fourth Circuit.

In testimony whereof I hereunto set my hand and affix the seal of the United States circuit court of appeals for the fourth circuit, at Richmond, this 27 day of April, A. D. 1898.

HENRY T. MELONEY,
Clerk U. S. Cir. Ct. Appeals, Fourth Circuit.

115 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fourth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The City of Richmond is appellant and The Southern Bell Telephone and Telegraph Company is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the eastern district of Virginia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the
116 Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

117 [Endorsed:] No. 16827. Supreme Court of the United States. No. 264, October term, 1898. The City of Richmond *vs.* The Southern Bell Telephone & Telegraph Co. Writ of certiorari and return. The execution of the within writ of certiorari appears from the certified transcript of the record mentioned in the therein-entitled cause, which is annexed hereto. Henry T. Meloney, cl'k U. S. circuit court of appeals, fourth circuit. April 27, 1898. Filed April 29, 1898.

IN THE

Supreme Court of the United States.

March Term, 1898.

CITY OF RICHMOND, APPELLANT,

vs.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, APPELLEE.

PETITION OF THE CITY OF RICHMOND (VIRGINIA) FOR A WRIT OF CERTIORARI TO BRING UP THE DECREE OF THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE FOURTH CIRCUIT IN THE ABOVE-STYLED CAUSE AND THE RECORD THEREOF.

To the Honorable Judges of the Supreme Court of the United States:

Your petitioner, the City of Richmond, respectfully shows to the Court as follows:

The appeal in this case to the United States Circuit Court of Appeals for the Fourth Circuit was taken from a decree of the Circuit Court of the United States for the Eastern District of Virginia, en-

tered on the 23d day of August, 1897, in the suit therein pending of Southern Bell Telephone and Telegraph Company v. City of Richmond.

By said decree it was adjudged that the said company has under the protection of a certain act of Congress, approved July 24, 1866, "the right to construct, maintain, and operate its lines over and along the streets and alleys of the city of Richmond, both those now occupied by the complainant company, and those not now so occupied, and to put up, renew, replace, and repair its lines, poles, and wires over and along said streets and alleys as well as to maintain, construct the same, and to connect its lines with new subscribers along said streets and alleys, and the said city of Richmond, its agents, officers, and all others are enjoined and restrained from cutting, removing, or in any way injuring the said lines, poles, and wires of the complainant company, and from preventing or interfering with the exercises of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising said rights."

STATEMENT OF CASE.

On July 24, 1866, Congress passed the act above mentioned "to aid in the construction of telegraph lines," &c., and provided therein as follows: "Any telegraph company which was then organized, or might thereafter be organized, under the laws of any State, and which should file a written acceptance with the Postmaster-General of the restrictions and obligations of said act, should have the right to construct, maintain and operate lines of telegraph, over and along any of the military roads and post-roads of the United States which had then or might thereafter be declared such by law."

On the 11th day of December, 1879, the appellee was chartered as a telegraph company. At that time there was in existence a telephone company known as the National Bell Telephone Company, and which had, on the 10th day of November, 1879, entered into a cer-

tain contract with the Western Union Telegraph Company acting for itself and certain other companies. Such portions of said contract as are supposed by the appellee to throw light upon the subject of this litigation are set forth in the record of this case upon pages 60 to 66. By article 1, section 1 of that contract the National Bell Telephone Company contracted to pay a certain royalty to the Western Union Telegraph Company upon all telephones used in the United States under license of the National Bell Telephone Company. By section 1, article 2, the word telephone is defined as "an instrument for electrically transmitting or receiving articulate speech." By article 6 the Western Union Telegraph Company agreed to withdraw from the manufacture, rental and use of telephones. By article 7 the Western Union Telegraph Company agreed to allow the National Bell Company to use any of its poles, fixtures, &c., upon reasonable terms. By section 2, article 12, a telephone "exchange" is defined. By section 1, article 13, telephone exchanges may be connected, provided they are not used for the transmission of general business messages, &c., in competition with the business of the Western Union Telegraph Company. In article 14 it is agreed that the National Bell shall furnish the Western Union with telephones for use in connection with telephone lines of said telephone company. In article 15 it is provided for the delivery of messages received from telephone lines and to be delivered over the telephone lines, or received over telephone lines and to be delivered over telegraph lines; and provides for a telephone connection between the office of the telegraph company and the office of the telephone exchange. By article 17 it is provided that the contract was to go into effect on the 1st of November, 1879, and to remain in force until the expiration of seventeen years thereafter; and further shows that the Richmond exchange was not embraced within the scope of the contract; that city being embraced in the terms of a contract between said Western Union Telegraph Company and said National Bell Telephone Company with James M. Ormes, dated August 26, 1879.

Subsequently the National Bell Telephone Company was merged into the American Bell Telephone Company, and the Ormes contract afterwards became the property of the Southern Bell Telephone and Telegraph Company. See record, p. 75. On September 1, 1888, the Southern Bell Telephone and Telegraph Company surrendered to the American Bell Telephone Company its privileges under the Ormes contract. See record, p. 75. And on the same day entered into a contract with the American Bell Company for the use of its telephones upon certain terms and conditions. (See pp. 66 to 75, record.)

By the surrender of the Ormes contract the Richmond exchange came within the scope of the above-mentioned contract of November 1, 1879. Several years previous to such surrender, the Ormes contract, so far as it pertained to the city of Richmond, became the property of the Southern Bell Telephone and Telegraph Company. For in 1884 that company applied to the city of Richmond for permission to erect poles in and run wires along the streets and alleys of the said city for telephonic purposes.

On June 26, 1884, the city of Richmond granted such permission under the provisions of an ordinance, a copy of which is filed with the complainant's bill as Exhibit K., page 31. By section 1 of that ordinance the company was authorized to erect such poles and run such wires on the streets of said city on such routes as the Committee on Streets may from time to time designate "upon the conditions and under the provisions of this ordinance." Section 2 required that it should carry certain wires of the city fire alarm and police telegraph. Section 3 required that it should furnish telephonic service to the city at a special reduction of $10 per annum for each municipal station. Section 4 forbid it from injuring shade trees. Section 5 read as follows: "The ordinance may at any time be repealed by the Council of the city of Richmond; such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law." It was under the provisions of this ordinance that the Richmond telephone ex-

change or plant was established by the complainant. No poles were erected or wires run by said company, except under the said ordinance. (See answer, page 43, record.)

On the 13th of February, 1889, nearly five years after it had accepted and worked under said ordinance, the said company filed its acceptance with the Postmaster-General of the above-mentioned act of Congress of July 24, 1866.

On the 18th day of July, 1891, the City Council passed an ordinance as to the joint use of poles erected in the city of Richmond for the support or wires used in connection with the transmission of electricity. Its general object was the diminution or the prevention of increase of poles for carrying wires for electrical purposes. That purpose was to be accomplished by requiring, so far as possible, the several companies running wires for different electrical purposes to hold and use the necessary poles jointly, instead of each company having its own poles, and thereby greatly encumbering the streets of the city of Richmond. The complainant company strenuously objected to said ordinance and refused to accept it. (See bill of complainant; page 7.) Such refusal was one of the reasons that caused the City Council afterwards to repeal the said ordinance of June 26, 1884, granting, as above stated, the privileges to the complainant company. Page 43.

Subsequently, in 1894, there was some correspondence between the City Engineer, speaking for a committee of the City Council known as the Committee on Grounds and Buildings, and Mr. McCluer, Superintendent of the Southern Bell Telephone and Telegraph Company, at Richmond office, in regard to the desire on the part of said committee that the complainant company should furnish free telephone service to the offices of several of the city officials. The complainant company, through Mr. McCluer, declined to furnish such free service. (See pp. 15 to 18.)

For several years previous to 1894, the Southern Bell Telephone and Telegraph Company has had its office connected with the office

of the Western Union Telegraph Company by telephone wires, and there connected with three sets of telephones received from the American Bell Telephone Company and used for receiving from and delivering to subscribers of the Southern Bell Telephone and Telegraph Company messages which were sent to and received from points in and without the State of Virginia and in foreign countries over the wires of the Western Union Telegraph Company. The method of use was as follows: A subscriber of the Southern Bell Telephone and Telegraph Company desiring to send a telegram over the Western Union lines calls up the Western Union office through his 'phone. "The clerk of the Western Union Telegraph Company at the 'phone in its office receives the message through the 'phone, puts it in writing and hands it to the operator of the Western Union Telegraph Company, who transmits it over the wires of the latter company to its destination. When a telegram is received from a point outside of Richmond over the wires of the Western Union Telegraph Company to be sent to a subscriber of the Southern Bell Telephone and Telegraph Company, the Western Union operator, who receives the message, puts it in writing and hands it to the 'phone clerk of the latter company, who has charge of one of the 'phones in its office in Richmond, who calls up the person to whom the message is directed over the 'phone and delivers it to him through the 'phone." (Page 85.) This system of assisting each other was in use when the bill in this case was filed.

In December, 1894, the City Council of Richmond referred to its Committee on Streets for its consideration and subsequent report a draft of an ordinance of a general nature as to underground conduits. (See p. 88, record.)

No more effect could be given to such a general ordinance as to conduits than could be given to the ordinance as to the joint use of poles, as long as the Southern Bell Telephone Company franchise was in force; so at the same meeting the Council repealed the said ordinance of June 26, 1884. (See p. 18, record.) This repeal ordinance was

approved December 14, 1894, and declared that "in accordance with the fifth section of said ordinance of June 26, 1884, all privileges and rights granted by said ordinance shall cease and be determined at the expiration of twelve months from the approval of this ordinance by the Mayor." On the 17th of that month the said Committee on Streets requested the telephone and telegraph representatives to appear before it and discuss the question of a general conduit ordinance. Later in the same month the superintendent of the Western Union Telegraph Company in said city appeared and discussed the matter, which was referred to the City Attorney and City Engineer for their suggestions. On the 28th day of February, 1895, the same city officials were instructed by said committee to prepare and submit " a general ordinance as to telephone conduits." See p. 88. That instruction resulted in the preparation and adoption by the City Council of the two ordinances filed with the complainant's bill as Exhibits "G" and "H" respectively. Both of these ordinances were approved September 10, 1895.

The ordinance filed as Exhibit "G" prescribed that no pole now erected in the city for the support of wires should remain on any street after a certain date, unless the owner or user should first petition for and obtain the privilege of erecting poles and wires for telephonic purposes in accordance with the conditions of that ordinance. It required that all such poles should be used jointly by the several companies running wires for electrical purposes, requiring heavy current wires to be placed on one set of poles and light current wires to be placed upon another set. It subjected the poles and their erection to the supervision of the City Engineer. It required such poles to carry the wires of the Fire-Alarm and Police Telegraph Department. It required an annual statement from the owner or user of such poles of their number and locations. It required an annual fee of $2.00 to be paid to the city authorities for every such pole. It contained certain provisions for the purpose of showing that said poles were kept in safe condition and that the wires were properly fastened and properly

insulated, so as to prevent the causing of a fire by the escape of electricity. The Council also reserved the right to put other restrictions and regulaions as to the erection of poles and wires, and to require such poles, as it might from time to time deem proper, to be removed and the wires to be run underground. (See p. 18 to 26, record.).

The said ordinance, filed as Exhibit "H," specified certain streets in the busier and more crowded parts of the city, in which no poles should remain after a specified date; but required that in this portion all wires for the transmission of electricity, except trolley wires, should be run in underground conduits. In order that the city's streets might not be torn up too frequently, to the great inconvenience of its citizens, the ordinance required that any conduit built under its provisions should be built of a sufficient capacity to carry not only the wires then in said streets and alleys, but to provide for the increase thereof to at least 100 per cent., or double the capacity required for present needs, and that the wires of the city should be carried free; and that other companies should be allowed, when they should have obtained the consent of the City Council thereto, to use said conduits upon reasonable compensation to be determined by arbitration. It required certain compensation to be paid to the city for the use of its streets in this manner. It contained minor details specifying that the construction of the conduits and the placing of the wires therein should be subject to the supervision of the proper city officials.

The complainant company refused to accept or operate under either of said ordinances. And instead of recognizing as binding upon it the said repeal ordinance of December 14, 1894, by removing its poles and wires, it went on the 6th day of October, 1896, into the Circuit Court of the United States for the Eastern District of Virginia and filed its bill of complaint in this suit.

Acting under the prayer of the said bill for an injunction restraining the city from interfering with its poles and wires in said streets and alleys, or with the erection of new poles and wires, or with the operation of its business, the Court granted a preliminary order restraining the city of Richmond from "injuring or in any way interfering with the poles, wires, instruments, or business of the plaintiff in said suit along and over the routes in said city now used by it; from interfering in any way with the proper use, maintenance, or repair of said poles, wires, and instruments of said plaintiff; and from taking proceedings to impose fines and penalties on said plaintiff for using, maintaining, or keeping in repair its said poles, wires, and implements until the further order of the Court; but leave is given the defendant upon ten days' notice to move to vacate this restraining order."

The complainant's bill alleges the incorporation of the company under the laws of New York and its residence in said State, and the existence of the city of Richmond as a municipal corporation under the laws of the State of Virginia. It alleges that the company was duly organized and that it has been engaged for about fifteen years in constructing, maintaining, and operating telephone lines in Virginia and several other States; and during that time it has continually maintained exchanges at various places in said States and the said city of Richmond; that it has maintained during that time the poles and wires and necessary instruments and apparatus for telephonic communication, and has erected and maintained, in conducting said business, numerous poles and wires in and along certain streets and alleys in the city of Richmond, and it has erected and maintained said lines, wires, and poles under authority of the Council of the city of Richmond, Legislature of the State of Virginia, and acts of Congress of the United States. That, in the conduct of its business, it has maintained in the city of Richmond an office or telephone exchange con-

nected by wires with a large number of subscribers, and with the office of the Western Union Telegraph Company in said city; that many of said subscribers are connected through said exchange with the office of the Western Union Telegraph Company, and many of said subscribers do, transmit and receive through their instruments on said premises, through said exchange to and from the office of the Western Union Telegraph Company, messages addressed and intended to be sent and received, and which are sent to and received from points in other States, in the District of Columbia, and foreign countries; your said orator having for years received and transmitted such messages in this manner under agreement still in force; and it also has subscribers outside of the city of Richmond, whose 'phones connect with the other 'phones of your orator in said city, by and through the means of wires and poles of your orator located on and along the streets and alleys of said city, many of which customers have no ready and convenient access to said Telegraph Company except through the use of your orator's wires and poles for the transmission and receipt of telegrams between them and points outside the State of Virginia, and use said 'phones, wires, and poles of your orator in connection with said Western Union Telegraph Company, for that purpose, under and by virtue of an agreement between your orator and said Western Union Telegraph Company for the joint use of the poles and fixtures for said companies in sending and receiving such messages; and that part of such transmission from the office of your orator's subscribers to and from the office of the Western Union Telegraph Company, of messages addressed and sent by telegraph to and from points outside of the State of Virginia, to the District of Columbia, and to foreign countries, is interstate commerce, and is commerce between said points outside of the city of Richmond and the city of Richmond, and other States and the District of Columbia and foreign countries, and is a necessary part of the business of your orator, and that its said wires in the city of Richmond, and its poles, to which they are attached, are used for that purpose."

The bill also alleges that it is the intention of the company to extend its business and lines across and beyond the city of Richmond, and State of Virginia, and into other countries and States. It alleges that its wires, poles and lines in said streets and alleys of the city of Richmond constitute a part of the postal service of the United States; that every day it has to connect many of its subscribers with the office of the Western Union Telegraph Company for purposes of communication by means of the lines of said telegraph company between said subscribers in Richmond and their correspondents in other States. It alleges that its continuance as a telephone exchange is an essential and necessary part of the business of its subscribers; that its business and status is that of a telegraph company under the laws of the United States. It alleges its filing its acceptance of said act of Congress of July 24th, 1866; and that by virtue of said acceptance it is entitled to operate lines of telephones over and along the post-roads of the United States, and that the streets, alleys and highways of the city of Richmond are among such post-roads. It further alleges that the several departments of the United States located in Richmond used the lines and wires of said company for transmission by telephone of instructions, orders and information in the administration of governmental affairs. It alleges that, in addition to its rights under said act of Congress, it was duly authorized to construct and maintain said telephone lines under stection 1287 of the Code of Virginia (1887) along and over the streets and alleys of any city in said State, with the consent of the Council thereof. That, relying on its rights, it erected poles and wires in said streets and alleys and conducted its business therein and executed many contracts to furnish telephonic facilities to residents of Richmond, persons outside of said city, and to the officers and agents of the Federal Government. It alleges that under the said act of Congress it is entitled to maintain and operate its lines without regard to the consent of said city, and did, in fact, locate many poles and wires and began operation of its business without such consent. It alleges that the city did, on the 26th day of June, 1884,

after it had begun to operate its business in pursuance of section 1287 of the Code of Virginia, pass the ordinance giving its permission to erect poles and run suitable wires upon the streets of said city, and states further, in substance, the terms of said ordinance and filed with the bill a copy of said ordinance as Exhibit "K;" that, after the passage of said ordinance and in pursuance of the terms thereof and relying thereon as well as on the rights granted by the laws of the United States and State of Virginia, hereinbefore referred to, and before the attempted repeal of said ordinance, it erected poles and wires and operated telephone lines along and over the said streets of the city of Richmond. It alleges that while it was so conducting its business the city of Richmond, through its officials, began to make demands not only outside of its agreements with said city, but which were injurious to the company's business. It then alleges the passage of the ordinance of July 18, 1891, as to the joint use of poles. It alleges that threats were made by some of those in authority in said city that, unless the company submitted to the requirements of the last-named ordinance, it would be driven from the city. It alleges that early in the year 1894 a demand was made upon the company for a number of free 'phones for the use of the city officials. It filed with its bill the correspondence about free 'phones between the City Engineer and Mr. McCluer, which has already been alluded to. It alleges that many threats were made of driving the company from the city, if the demands for free 'phones were not granted. It alleges the passage of the repeal ordinance of December 14, 1894, and files a copy as Exhibit "F." It alleges the passage of the two ordinances approved September 10, 1895, above mentioned, and files copies of the same as Exhibits "G" and "H." It alleges that the power to repeal an ordinance does not contain the power to compel the removal of the poles and wires.

It alleges that the repeal ordinance cannot be construed to mean that such removal shall take place, and alleges that the reserved power of repeal and the repeal ordinance itself was only intended to prevent

the granting of new routes by the Committee on Streets. It also insisted that the fifth section of said ordinance of June 26, 1884, reserving the right of repeal was *null and void* upon the ground that the City Council had no power to repeal, and that such power lay entirely in the Legislature of Virginia under section 1290 of the Code of Virginia. It further insisted that, having accepted the provisions of the act of Congress, it was entitled to the rights given by said act independent of, and superior to, that of the city of Richmond. It insists that telephone companies are embraced in the terms of said act of Congress. It then alleges that the city had granted a new telephone company, a rival of the complainant, the right to erect poles and wires along many of the same streets and routes which the complainant then occupied, and to put many of its poles along side the poles of the complainant. It alleges that the city claims the right not only to prevent the company from erecting new poles and wires and extending its lines, but to make it remove its then existing poles and wires. That the officers of the city alleged that the complainant had no right to occupy said streets and alleys of the city. That the ordinances before mentioned are a constant menace to its rights and privileges and intended to deter persons from making contracts with it. That its contract rights, franchise, and property will be destroyed, unless afforded protection asked for in the bill, and to that end prays that the city may be restrained and enjoined from "removing or interfering with its poles and wires in said city, and from interfering with the right of your orator to use said poles and wires, and that all proceedings by said city or its agents and others to prevent your orator from continuing, renewing, repairing, and extending its lines, wires, and poles in, along and over the streets and alleys of the said city, and to inflict fines and penalties on your orator for so doing, may be restrained and enjoined; that the right of your orator to use said poles and wires and to carry on its said business along and over the streets of the said city be declared and defined; that the ordinances of said city of the 14th of December, 1894, and of the 10th of September, 1895, so far as

they undertake to prevent your orator from maintaining and using its lines, poles, and wires over and along the streets and alleys of the city of Richmond from repairing, renewing, and extending its said poles, wires, lines, and routes as its business may require may be declared *null* and *void.*"

With the bill were filed the exhibits which have already been referred to.

On the 16th day of November, 1896, the city filed its demurrer to the bill, and for causes of demurrer alleged: That the bill was insufficient. That the act of Congress of July 24, 1866, does not apply to the complainant, but only to telegraph companies. That the said act, even if it applied to the complainant, does not give it any right to run its lines along the streets of the city without its consent and subject to reasonable regulations both as to occupancy of the streets and compensation for such use. That, if the act of Congress put the complainant as free of control of the city as it claimed in said bill, it is unconstitutional and void. That the manner of determining as to the routes of the poles and wires of the complainant and the compensation to be paid to the city was agreed upon in said ordinance of June 26, 1884, upon condition that the city should reserve the right to repeal said ordinance and require the complainant to remove its poles and wires as provided in said ordinance. That the said ordinance of July 26, 1884, was an agreement between the city of Richmond and said company, and the city in passing said repeal ordinance of December 14, 1894, was merely exercising the right reserved in said agreement. That under the Statute of Virginia referred to in said bill, respondent was given authority to reserve such power of revocation. That the power of such revocation had been properly exercised in said ordinance of December 14, 1894.

By consent, the hearing on said demurrer and restraining order was postponed until January 14, 1897, on which day the cause came on to be heard on said demurrer.

On January 24, 1897, the court filed an opinion overruling the de-

murrer. (See pp. 35 to 40.) And on March 15, 1897, entered an order, in accordance with said opinion overruling said demurrer, continuing the injunction until the further order of the court, and gave leave to the city to file its answer.

On March 30, 1897, the city filed its answer.

The city admitted that since 1884 the complainant had been maintaining and operating a telephone exchange, and had erected its poles and run its wires along the streets of said city; but denied that it had carrried on said business, or used said streets for such purposes under any authority, except that of the City Council of Richmond and the Legislature of Virginia. The city called for proof of the alleged agreement between the complainant and the Western Union Telegraph Company. It denied that the sending of any messages over the wires of the complainant to be transmitted subsequently over the wires of said telegraph company to points outside of the State of Virginia was interstate commerce; or that such was a necessary part of the business of complainant. It denied that the said wires, poles and lines of the complainant constituted a part of the postal service of the United States, or that the business of the complainant was essential to the business of its subscribers for communication outside of Virginia. It denied that the business and status of the complainant, so far as it concerned its Richmond exchange and its poles and wires on the streets of said city was a telegraph company. It alleged that, while the complainant may have been chartered as a telegraph company, yet that, so far as its Richmond exchange was concerned, it did no business as a telegraph company. It denied that the complainant was entitled to the protection given by the provisions of said act of Congress of July 24, 1866. It insisted that the departments of the United States Government, located in Richmond, only used said telephone exchange as any other subscriber did. It denied, and called for proof, that the complainant ever erected any poles or wires in said streets and alleys before applying to said city for permission so to do. It admitted the passage of the ordinance of June 18, 1891, as to the

joint use of poles; and alleged the same reasons which have been heretofore stated for its passage. It denied knowledge of any threats having been made that the business of the complainant would be ruined, and asserted that no such threats were authorized by the city. It admits the passage of the repeal ordinance of December 14, 1894. It alleged that the Council intended, before the lapse of the twelve months required to make the repeal ordinance effective, to pass a general ordinance relating to telephone poles and wires; and did pass two such ordinances, approved September 10,1895, copies of which are filed as exhibits with the bill. It denies that, if the complainant filed a petition for the continuance of its poles, it would have to agree to remove them should it fail to obtain such permission. It denies the construction put upon its reserved power to repeal, and the effect of said repeal ordinance. It denies that the acceptance of said act of Congress rendered the complainant independent of the control of the city of Richmond as to the poles and wires erected under the ordinance of June 26, 1884, and insisted that, having entered under the contract contained in the last mentioned ordinance, it was bound to obey in law the terms of that contract. It denies that telephone companies were intended to be embraced in the scope of said act of Congress. It admits that it has allowed the Richmond Standard Telephone Company to erect its poles and wires on certain streets and alleys of the city of Richmond; the latter company having accepted the terms of said ordinances approved September 10, 1895. It asserts that had the complainant company accepted the terms of said ordinances, then the Standard Company, had it entered at a later date, would have been obliged to have placed its wires, as far as practicable, on the poles of the complainant company; and insists that the complainant company having refused to accept said terms, and the Richmond Standard Company having erected its poles in pursuance of said terms, the complainant company must, when it run its wires under any authority, place them upon the poles of the Richmond Standard Company in accordance with the terms

of the ordinance of September 10, 1895, as to the joint use of poles. It alleges that it had expressed no intention of giving any order to any of its officers to cut down the poles of the complainant company, and had done nothing to justify such fear.

The ordinance of September 10, 1895, filed as Exhibit H with the bill of complaint, provides a method for testing when a telephone pole is unlawfully in the street. That method is to summon the offender before one of its courts of lawful jurisdiction, and there have the right determined.

At May rules, 1897, the complainant company filed its replication. The evidence was then taken by both sides; but was taken by way of consent, as will be seen in the statement of the evidence on pages 51 to 88; and a statement of agreed facts from pages 88 to 90. The evidence so introduced and the facts agreed have been already sufficiently stated in the statement of the case as not to need repetition.

On the 23d of August, 1897, the Circuit Court entered the decree above complained of. On the 28th day of August, 1897, the city moved the Court to modify its decree " in this cause of August 23, 1897, by inserting therein after the words 'construct and operate the same,' the following words, to-wit: 'So far as to receive from and deliver to the Western Union Telegraph Company messages sent from beyond the limits of the State of Virginia, or to be sent beyond the said limits,' and by inserting therein after the words 'interfering with the exercise of the aforesaid rights by the complainant company,' the following words, to-wit: 'So far as the reception from and delivery to the Western Union Telegraph Company of any message sent from beyond the limits of the State of Virginia, or to be sent beyond said limits,' but the counsel for the complainant objected, and the Court, intending by said injunction to enjoin the city from interfering with the local business and messages, as well as those of an interstate character, doth decline and refuse to so modify said decree."

Your petitioner duly filed its petition of appeal from said decree of August 23d, and stated its assignment of errors.

ASSIGNMENT OF ERRORS.

1st. The Court erred in entering said temporary restraining order.

2d and 3d. That the Court erred in not sustaining the city's demurrer, and in overruling the same, and in entering the decree of March 15, 1897.

4th. That the Court erred in the said decree of August 23d in failing to pass upon the effect had upon the alleged rights of the complainant by the said statue of Virginia and the said city ordinance of June 26, 1884.

5th. That there is error in said decree because a telephone company is not a telegraph company under said act of Congress.

6th. Because if said act of Congress does embrace telephone companies, it only embraces such as do an interstate business and only to the extent of its interstate business; while the complainant only does a local business.

7. Because, even if the complainant does an interstate business it also does a purely local business, and yet the Court in its decree refuses to recognize such a distinction, and enjoins the city from interfering with the business of the company, even as to messages sent from one point in the State to another, or even from one point in the city to some other point therein.

8th. Because there was never any contract between the complainant company and the Western Union Telegraph Company which made the telephone business of the complainant company, or any part of it, interstate commerce.

9th. Because if there ever was any such contract it terminated on the 1st day of November, 1896.

10th. That even if there now existed any such contract which made any of the messages be of the nature of interstate commerce, yet the city should not have been enjoined from interfering with the business of the company as to messages sent from one point of the State to another, or from a point in said city to some other point therein.

11th. Because the decree gives the complainant the unrestricted right to erect poles anywhere in said city without being subject to the said ordinance of September 10, 1895, filed as "Exhibit "G" with the bill of complaint, or in any of its provisions.

The appeal to the Circuit Court of Appeals for the Fourth Circuit was decided on February 1st, 1898. In the opinion of the majority of the Court, being Judges Simonton and Purnell, all of said assignments of errors, except the eleventh, was in substance overruled, though not specifically. The eleventh assignment was only held good in part. As to it, the Court said as follows:

"This being so, the injunction granted by the Circuit Court is too broad in its language and effect. There should have been the recognition of a proper exercise of the police power by the municipal corporation, and the use by the complainant of its poles and lines should have been declared to be subject to such regulations and restrictions as may now or may be hereafter imposed by the City Council of Richmond, in the proper and lawful exercise of the police power.

"The only remaining question is, do the ordinances of the city of Richmond prescribe regulations which will make the use burdensome and intolerable, and practically impossible?

"It belongs to the Legislature to exercise the police power of the State, subject to the power of the courts to adjudge whether any particular law is an invasion to rights secured by the Constitution. (*Mugler* vs. *Kansas*, 123 U. S. 623.) The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business of or impose any unnecessarily restrictions upon lawful occupations. In other words, its detrmination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts. (*Lawton* v. *Steele*, 152 U. S. 137.) If this be the case with regard to the Legislature, *a fortiori* it applies to a municipal corporation, the creature of the Legislature.

"On examination of these ordinances it will be seen that as a condition precedent to the use of the streets of Richmond, a petition

must first be filed for the purpose of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of that ordinance, and such other conditions as the Council may see fit to impose. (Ordinance approved 10th September, 1895.) The 7th section of this ordinance expressly reserves to the City Council the right to put at any time other restrictions and regulations. And the whole tenor and effect of the ordinance is to put the company absolutely under the control of the city. And the terms of the ordinance are enforcible under heavy penalties. The next ordinance, the one providing for wires in conduits, after providing that the City Council may compel the removal of wires from poles overhead in certain streets, and the putting them in conduits in certain streets, under a penalty of not less than $100 or more than $500 for each pole per week, provision is made for permission to build conduits of sufficient capacity to accommodate the wires in such streets, and to provide for an increase thereof to at least the extent of 100 per cent., the increase of space not to be occupied by the party building the conduits without the consent of the Council, the conduit to be used for the wires of the Council free, and the City Council to allow any other person or corporation to use such conduit for wires upon paying compensation in the mode prescribed by the City Council. This privilege of building and owning conduits to last no longer than fifteen years, at the end of which time the city may put other restrictions, conditions, and charges as it may see fit, or may order their removal at the expense of the owner. The charge for using or owning any wire in any such conduit shall be for each year until January 1, 1900, $2.00 per wire per mile. After January 1, 1900, such larger commission for the rest of the term as the City Council may see fit. These are some of the conditions now imposed with the right to impose any others which Council may see fit. Now it goes without saying that if the complainant, notwithstanding its claim of protection under the act of Congress of 1866, were willing to file a petition to the City Council for the privilege of using its streets and alleys, and in that petition agreed, in con-

sideration of its grant, to abide by any present or future condition, regulation or restriction the Council may impose, this would be a binding contract, and would control the complainant. (*R. R. Co.* vs. *Ryan* 153 U. S. 436.) Whatever the rights of the complainant may have been under such a stipulation, it would surrender them and come within the absolute domination of the City Council. The courts could not review any ordinance to discover if it be within the lawful exercise of the police power, for the complainant would be bound by its contract to obey the ordinance, be it police regulation or not.

"These conditions, regulations, and restrictions already prescribed by the City Council appear to be stimulated by a desire to press and control, perhaps defeat, the existence of the complainant, and so are not the lawful exercise of the police power.

"Let the case be remanded to the Circuit Court with instructions to modify the terms of the injunction therein granted, so that it may conform to the principles declared in this opinion, the costs of the case to be equally divided between the parties."

Judge Brawley delivered the following dissenting opinion:

"I concur in the result, but am not inclined to assent to so much of the opinion as holds that a telephone company, such as is described in this case, and whose business is local in character, is within the purview of the act of Congress of July 14, 1866, relating to telegraph companies."

REASONS FOR WRIT OF CERTIORARI.

Your petition submits the following reasons why the said decree of affirmance should be brought here by writ of certiorari for review by this Court:

First. The questions of law involved in the affirmed decree as above stated are of great importance and general interest, because they very materially concern the extent and the limits of the power of

municipalities over the construction and operation of telephone companies in their midst, and, if allowed to remain unchallenged and settled by said decree of affirmance, will of necessity govern future decrees involving such questions in said circuit, and greatly affect similar litigation arising in other circuits.

Second. As affecting the rights of all telephone companies and the powers of all municipalities in this country, it is most desirable, if not necessary, to have it authoritatively decided. 1st. Whether any telephone company is embraced within the scope of the said act of Congress of July 24th, 1866. 2d. Whether a telephone company doing a *local* business only is within the purview of said act. 3d. Whether a telephone company doing both an interstate and a *local* business is beyond the interference or control of a municipality as to its *local* business as well as its interstate business.

The said opinion and decree of affirmance is in direct conflict with decisions of this court as to the control of State authorities over telegraph messages or freight charges of a local, and not of an interstate character.

Third. It is of great importance that municipalities should know to what extent they can impose restrictions and conditions upon telephone companies using their streets.

Fourth. That the Circuit Court of Appeals erred in deciding that a telephone company is embraced in the act of Congress of July 24, 1866.

Fifth. That the Circuit Court of Appeals erred in holding that the complainant comes within the protection of the said act of Congress. 1st. Because its business is of a local and not of an interstate nature. 2d. Because, even if the complainant is entitled to the protection of said act as to its business in connection with the Western Union Telegraph Company, yet it was not put by said act above municipal control as to its purely local business, viz.: messages which never left the limits of the city, much less the limits of the State.

Sixth. The Circuit Court of Appeals erred in holding that,

although the lines of the complainant were erected and constructed under the terms set forth in the contract—ordinance of June 26, 1884, yet that the company had the right to remain in occupancy of the streets of your petitioner after said ordinance had been repealed by a valid ordinance.

Seventh. The Circuit Court of Appeals erred in holding that the restrictions and conditions set forth in the two ordinances heretofore mentioned of your petitioner, and approved September 10, 1895, and commented upon in the opinion of that court, were void as not being lawful exercise of the police powers of your petitioners.

Your petitioner exhibits as a part of this application a certified copy of the record, decree of affirmance and opinions of the said Court of Appeals.

In view of the nature of the questions of law involved, and in view of the errors complained of, your petitioner prays that this Honorable Court will grant its writ of *certiorari* directed to the Circuit Court of Appeals of the United States for the Fourth Circuit, requiring that the record of the said cause in said court and its decree of affirmance thereof be certified to this court, and that this Honorable Court will, thereupon, proceed to correct the errors complained of, reverse the said decree, and remand the said cause, and give your petitioner such other and further relief as the nature of the case may require and to the court may seem meet in the premises.

THE CITY OF RICHMOND,
Petitioner.

C. V. MEREDITH, Solicitor.

STATE OF VIRGINIA,
CITY OF RICHMOND.

Before the undersigned, a notary public in and for the city aforesaid, personally came R. M. Taylor, Mayor of said city, and made oath that the allegations in the above petition for writ of *certiorari* are true to the best of his knowledge and belief.

Notary Public.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898

CITY OF RICHMOND, APPELLANT,

vs.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, APPELLEE.

No. 264.

MOTION OF THE CITY OF RICHMOND TO ADVANCE THE CAUSE UPON THE DOCKET.

To the Honorable Judges of the
Supreme Court of the United States:

The city of Richmond respectfully shows to the Court that it is the appellant in the above styled cause, which is upon the docket of this court—that it hereby submits to this Honorable Court a motion, that the said cause be taken out of its place upon said docket and advanced upon said docket so that it may be heard as soon as this court shall deem reasonable and proper—that in order to have such early hearing the Court will designate a day upon which said cause may be heard by this Court, and that proper notice may be given to all parties of such determination and designation.

The said city, in support of said motion, herein submits a statement as to the material facts shown in the record of said cause filed in this Court, and its reasons in support of said motion.

This cause is here upon a writ of *certiorari*, bringing up the decree of the Circuit Court of Appeals of the United States for the Fourth Circuit in the above-styled cause and the record thereof.

The appeal in this case to the United States Circuit Court of Appeals for the Fourth Circuit was taken from a decree of the Circuit Court of the United States for the Eastern District of Virginia, entered on the 23d day of August, 1897, in the suit therein pending of Southern Bell Telephone Company v. City of Richmond.

By said decree it was adjudged that the said company has under the protection of a certain act of Congress, approved July 24, 1866, "the right to construct, maintain, and operate its lines over and along the streets and alleys of the city of Richmond, both those now occupied by the complainant company, and those now so occupied, and to put up, renew, replace, and repair its lines, poles, and wires over and along said streets and alleys as well as to maintain, construct the same, and to connect its lines with new subscribers along said streets and alleys, and the said city of Richmond, its agents, officers, and all others are enjoined and restrained from cutting, removing, or in any way injuring the said lines, poles, and wires of the complainant company, and from preventing or interfering with the exercises of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising said rights."

STATEMENT OF CASE.

On July 24, 1866, Congress passed the act above mentioned "to aid in the construction of telegraph lines," &c., and provided therein as follows: "Any telegraph company which was then organized, or might thereafter be organized, under the laws of any State, and which should file a written acceptance with the Postmaster-General of the restrictions and obligations of said act, should have the right to construct, maintain and operate lines of telegraph, over and along any of the military roads and post-roads of the United States which had then or might thereafter be declared such by law."

On the 11th day of December, 1879, the appellee was chartered as

a telegraph company. At that time there was in existence a telephone company known as the National Bell Telephone Company, and which had, on the 10th day of November, 1879, entered into a certain contract with the Western Union Telegraph Company acting for itself and certain other companies. Such portions of said contract as are supposed by the appellee to throw light upon the subject of this litigation are set forth in the record of this case upon pages 60 and 66. By article 1, section 1 of that contract the National Bell Telephone Company contracted to pay a certain royalty to the Western Union Telegraph Company upon all telephones used in the United States under license of the National Bell Telephone Company. By section 1, article 2, the word telephone is defined as "an instrument for electrically transmitting or receiving articulate speech." By article 6 the Western Union Telegraph Company agreed to withdraw from the manufacture, rental and use of telephones. By article 7 the Western Union Telegraph Company agreed to allow the National Bell Company to use any of its poles, fixtures, &c., upon reasonable terms. By section 2, article 12, a telephone "exchange" is defined. By section 1, article 13, telephone exchanges may be connected, provided they are not used for the transmission of general business messages, &c., in competition with the business of the Western Union Telegraph Company. In article 14 it is agreed that the National Bell shall furnish the Western Union with telephones for use in connection with telephone lines of said telephone company. In article 15 it is provided for the delivery of messages received from telephone lines and to be delivered over the telephone lines, or received over telephone lines and to be delivered over telegraph lines; and provides for a telephone connection between the office of the telegraph company and the office of the telephone exchange. By article 17 it is provided that the contract was to go into effect on the 1st of November, 1879, and to remain in force until the expiration of seventeen years thereafter; and further shows that the Richmond exchange was not embraced within the scope of the contract; that city being embraced in the terms of a contract between said Western Union Telegraph Company and said National Bell Telephone Company with James M. Ormes, dated August 26, 1879.

Subsequently the National Bell Telephone Company was merged into the American Bell Telephone Company, and the Ormes contract afterwards became the property of the Southern Bell Telephone and

Telegraph Company. See record, p. 75. On September 1, 1888, the Southern Bell Telephone and Telegraph Company surrendered to the American Bell Telephone Company its privileges under the Ormes contract. See record, p. 75. And on the same day entered into a contract with the American Bell Company for the use of its telephones upon certain terms and conditions. (See pp. 66 to 75, record.)

By the surrender of the Ormes contract the Richmond exchange came within the scope of the above-mentioned contract of November 1, 1879. Several years previous to such surrender, the Ormes contract, so far as it pertained to the city of Richmond, became the property of the Southern Bell Telephone and Telegraph Company. For in 1884 that company applied to the city of Richmond for permission to erect poles in and run wires along the streets and alleys of the said city for telephonic purposes.

On June 26, 1884, the city of Richmond granted such permission under the provisions of an ordinance, a copy of which is filed with the complainant's bill as Exhibit K., page 31. By section 1 of that ordinance the company was authorized to erect such poles and run such wires on the streets of said city on such routes as the Committee on Streets may from time to time designate "upon the conditions and under the provisions of this ordinance." Section 2 required that it should carry certain wires of the city fire alarm and police telegraph. Section 3 required that it should furnish telephonic service to the city at a special reduction of $10 per annum for each municipal station. Section 4 forbid it from injuring shade trees. Section 5 read as follows: "The ordinance may at any time be repealed by the Council of the city of Richmond; such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law." It was under the provisions of this ordinance that the Richmond telephone exchange or plant was established by the complainant. No poles were erected or wires run by said company, except under the said ordinance. (See answer, page 43, record.)

On the 13th of February, 1889, nearly five years after it had accepted and worked under said ordinance, the said company filed its acceptance with the Postmaster-General of the above-mentioned act of Congress of July 24, 1866.

On the 18th day of July, 1891, the City Council passed an ordinance as to the joint use of poles erected in the city of Richmond for

the support of wires used in connection with the transmission of electricity. Its general object was the diminution or the prevention of increase of poles for carrying wires for electrical purposes. That purpose was to be accomplished by requiring, so far as possible, the several companies running wires for different electrical purposes to hold and use the necessary poles jointly, instead of each company having its own poles, and thereby greatly encumbering the streets of the city of Richmond. The complainant company strenuously objected to said ordinance and refused to accept it. (See bill of complainant, page 7.) Such refusal was one of the reasons that caused the City Council afterwards to repeal the said ordinance of June 26, 1884, granting, as above stated, the privileges to the complainant company. Page 43.

Subsequently, in 1894, there was some correspondence between the City Engineer, speaking for a committee of the City Council known as the Committee on Grounds and Buildings, and Mr. McCluer, Superintendent of the Southern Bell Telephone and Telegraph Company, at Richmond office, in regard to the desire on the part of said committee that the complainant company should furnish free telephone service to the offices of several of the city officials. The complainant company, through Mr. McCluer, declined to furnish such free service. (See pp. 15 to 18.)

For several years previous to 1894, the Southern Bell Telephone and Telegraph Company has had its office connected with the office of the Western Union Telegraph Company by telephone wires, and there connected with three sets of telephones received from the American Bell Telephone Company and used for receiving from and delivering to subscribers of the Southern Bell Telephone and Telegraph Company messages which were sent to and received from points in and without the State of Virginia and in foreign countries over the wires of the Western Union Telegraph Company. The method of use was as follows: A subscriber of the Southern Bell Telephone and Telegraph Company desiring to send a telegram over the Western Union lines calls up the Western Union office through his 'phone. "The clerk of the Western Union Telegraph Company at the 'phone in its office receives the message through the 'phone, puts it in writing and hands it to the operator of the Western Union Telegraph Company, who transmits it over the wires of the latter company to its destination. When a telegram is received from a point outside of

Richmond over the wires of the Western Union Telegraph Company to be sent to a subscriber of the Southern Bell Telephone and Telegraph Company, the Western Union operator, who receives the message, puts it in writing and hands it to the 'phone clerk of the latter company, who has charge of one of the 'phones in its office in Richmond, who calls up the person to whom the message is directed over the 'phone and delivers it to him through the 'phone." (Page 85.) This system of assisting each other was in use when the bill in this case was filed.

In December, 1894, the City Council of Richmond referred to its Committee on Streets for its consideration and subsequent report a draft of an ordinance of a general nature as to underground conduits. (See p. 88, record.)

No more effect could be given to such a general ordinance as to conduits than could be given to the ordinance as to the joint use of poles, as long as the Southern Bell Telephone Company franchise was in force; so at the same meeting the Council repealed the said ordinance of June 26, 1884. (See p. 18, record.) This repeal ordinance was approved December 14, 1894, and declared that "in accordance with the fifth section of said ordinance of June 26, 1884, all privileges and rights granted by said ordinance shall cease and be determined at the expiration of twelve months from the approval of this ordinance by the Mayor." On the 17th of that month the said Committee on Streets requested the telephone and telegraph representatives to appear before it and discuss the question of a general conduit ordinance. Later in the same month the superintendent of the Western Union Telegraph Company in said city appeared and discussed the matter, which was referred to the City Attorney and City Engineer for their suggestions. On the 28th day of February, 1895, the same city officials were instructed by said committee to prepare and submit "a general ordinance as to telephone conduits." See p. 88. That instruction resulted in the preparation and adoption by the City Council of the two ordinances filed with the complainant's bill as Exhibits "G" and "H" respectively. Both of these ordinances were approved September 10, 1895.

The ordinance filed as Exhibit "G" prescribed that no pole now erected in the city for the support of wires should remain on any street after a certain date, unless the owner or user should first petition for and obtain the privilege of erecting poles and wires for tele-

phonic purposes in accordance with the conditions of that ordinance. It required that all such poles should be used jointly by the several companies running wires for electrical purposes, requiring heavy current wires to be placed on one set of poles and light current wires to be placed upon another set. It subjected the poles and their erection to the supervision of the City Engineer. It required such poles to carry the wires of the Fire-Alarm and Police Telegraph Department. It required an annual statement from the owner or user of such poles of their number and locations. It required an annual fee of $2.00 to be paid to the city authorities for every such pole. It contained certain provisions for the purpose of showing that said poles were kept in safe condition and that the wires were properly fastened and properly insulated, so as to prevent the causing of a fire by the escape of electricity. The Council also reserved the right to put other restrictions and regulations as to the erection of poles and wires, and to require such poles, as it might from time to time deem proper, to be removed and the wires to be run underground. (See p. 18 to 26, record.)

The said ordinance, filed as Exhibit "H," specified certain streets in the busier and more crowded parts of the city, in which no poles should remain after a specified date; but required that in this portion all wires for the transmission of electricity, except trolley wires, should be run in underground conduits. In order that the city's streets might not be torn up too frequently, to the great inconvenience of its citizens, the ordinance required that any conduit built under its provisions should be built of a sufficient capacity to carry not only the wires then in said streets and alleys, but to provide for the increase thereof to at least 100 per cent., or double the capacity required for present needs, and that the wires of the city should be carried free; and that other companies should be allowed, when they should have obtained the consent of the City Council thereto, to use said conduits upon reasonable compensation to be determined by arbitration. It required certain compensation to be paid to the city for the use of its streets in this manner. It contained minor details specifying that the construction of the conduits and the placing of the wires therein should be subject to the supervision of the proper city officials.

The complainant company refused to accept or operate under either of said ordinances. And instead of recognizing as binding upon it the said repeal ordinance of December 14, 1894, by removing its poles and wires, it went on the 6th day of October, 1896, into the Circuit

Court of the United States for the Eastern District of Virginia and filed its bill of complaint in this suit.

PLEADINGS.

Acting under the prayer of the said bill for an injunction restraining the city from interfering with its poles and wires in said streets and alleys, or with the erection of new poles and wires, or with the operation of its business, the Court granted a preliminary order restraining the city of Richmond from "injuring or in way interfering with the poles, wires, instruments, or business of the plaintiff in said suit along and over the routes in said city now used by it; from interfering in any way with the proper use, maintenance, or repair of said poles, wires, and instruments of said plaintiff; and from taking proceedings to impose fines and penalties on said plaintiff for using, maintaining, or keeping in repair its said poles, wires, and implements until the further order of the Court; but leave is given the defendant upon ten days' notice to move to vacate this restraining order."

The complainant's bill alleges the incorporation of the company under the laws of New York and its residence in said State, and the existence of the city of Richmond as a municipal corporation under the laws of the State of Virginia. It alleges that the company was duly organized and that it has been engaged for about fifteen years in constructing, maintaining, and operating telephone lines in Virginia and several other States; and during that time it has continually maintained exchanges at various places in said States and the said city of Richmond; that it has maintained during that time the poles and wires and necessary instruments and apparatus for telephonic communication, and has erected and maintained, in conducting said business, numerous poles and wires in and along certain streets and alleys in the city of Richmond, and it has erected and maintained said lines, wires, and poles under authority of the Council of the city of Richmond, Legislature of the State of Virginia and acts of Congress of the United States. That, in the conduct of its business, it has maintained in the city of Richmond an office or telephone exchange connected by wires with a large number of subscribers, and with the office of the Western Union Telegraph Company in said city; that many of said subscribers are connected through said exchange with the office of the Western Union Telegraph Company, and many of said

subscribers do, transmit and receive through their instruments on said premises, through said exchange to and from the office of the Western Union Telegraph Company, messages addressed and intended to be sent and received, and which are sent to and received from points in other States, in the District of Columbia, and foreign countries; your said orator having for years received and transmitted such messages in this manner under agreement still in force; and it also has subscribers outside of the city of Richmond, whose 'phones connect with the other 'phones of your orator in said city, by and through the means of wires and poles of your orator located on and along the streets and alleys of said city, many of which customers have no ready and convenient access to said Telegraph Company except through the use of your orator's wires and poles for the transmission and receipt of telegrams between them and points outside the State of Virginia, and use said 'phones, wires, and poles of your orator in connection with said Western Union Telegraph Company, for that purpose, under and by virtue of an agreement between your orator and said Western Union Telegraph Company for the joint use of the poles and fixtures for said companies in sending and receiving such messages; and that part of such transmission from the office of your orator's subscribers to and from the office of the Western Union Telegraph Company, of messages addressed and sent by telegraph to and from points outside of the State of Virginia, to the District of Columbia, and to foreign countries, is interstate commerce, and is commerce between said points outside of the city of Richmond and the city of Richmond, and other States and the District of Columbia and foreign countries, and it is a necessary part of the business of your orator, and that its said wires in the city of Richmond, and its poles, to which they are attached, are used for that purpose."

The bill also alleges that it is the intention of the company to extend its business and lines across and beyond the city of Richmond, and State of Virginia, and into other countries and States. It alleges that its wires, poles and lines in said streets and alleys of the city of Richmond constitute a part of the postal service of the United States; that every day it has to connect many of its subscribers with the office of the Western Union Telegraph Company for purposes of communication by means of the lines of said telegraph company between said subscribers in Richmond and their correspondents in other States. It alleges that its continuance as a telephone exchange is an essential and

necessary part of the business of its subscribers; that its business and status is that of a telegraph company under the laws of the United States. It alleges its filing its acceptance of said act of Congress of July 24th, 1866; and that by virtue of said acceptance it is entitled to operate lines of telephones over and along the post-roads of the United States, and that the streets, alleys and highways of the city of Richmond are among such post-roads. It further alleges that the several departments of the United States located in Richmond used the lines and wires of said company for transmission by telephone of instructions, orders and information in the administration of governmental affairs. It alleges that, in addition to its rights under said act of Congress, it was duly authorized to contruct and maintain said telephone lines under section 1287 of the Code of Virgina (1887) along and over the streets and alleys of any city in said State, with the consent of the Council thereof. That, relying on its rights, it erected poles and wires in said streets and alleys and conducted its business therein and executed many contracts to furnish telephonic facilities to residents of Richmond, persons outside of said city, and to the officers and agents of the Federal Government. It alleges that under the said act of Congress it is entitled to maintain and operate its lines without regard to the consent of said city, and did, in fact, locate many poles and wires and began operation of its business without such consent. It alleges that the city did, on the 26th day of June, 1884, after it had begun to operate its business in pursuance of section 1287 of the Code of Virginia, pass the ordinance giving its permission to erect poles and run suitable wires upon the streets of said city, and states further, in substance, the terms of said ordinance and filed with the bill a copy of said ordinance as Exhibit "K;" that, after the passage of said ordinance and in pursuance of the terms thereof and relying thereon as well as on the rights granted by the laws of the United States and State of Virginia, hereinbefore referred to, and before the attempted repeal of said ordinance, it erected poles and wires and operated telephone lines along and over the said streets of the city of Richmond. It alleges that while it was so conducting its business the city of Richmond, through its officials, began to make demands not only outside of its agreements with said city, but which were injurious to the company's business. It then alleges the passage of the ordinance of July 18, 1891, as to the joint use of poles. It alleges that threats were made by some of those in authority in said city that,

unless the company submitted to the requirements of the last-named ordinance, it would be driven from the city. It alleges that early in the year 1894 a demand was made upon the company for a number of free 'phones for the use of the city officials. It filed with its bill the correspondence about free 'phones between the City Engineer and Mr. McCluer, which has already been alluded to. It alleges that many threats were made of driving the company from the city, if the demands for free 'phones were not granted. It alleges the passage of the repeal ordinance of December 14, 1894, and files a copy as Exhibit "F." It alleges the passage of the two ordinances approved September 10, 1895, above mentioned and files copies of the same as Exhibits "G" and "H." It alleges that the power to repeal an ordinance does not contain the power to compel the removal of the poles and wires.

It alleges that the repeal ordinance cannot be construed to mean that such removal shall take place, and alleges that the reserved power of repeal and the repeal ordinance itself was only intended to prevent the granting of new routes by the Committee on Streets. It also insisted that the fifth section of said ordinance of June 26, 1884, reserving the right of repeal was *null and void* upon the ground that the City Council had no power to repeal, and that such power lay entirely in the Legislature of Virginia under section 1290 of the Code of Virginia. It further insisted that, having accepted the provisions of the act of Congress, it was entitled to the rights given by said act independent of, and superior to, that of the city of Richmond. It insists that telephone companies are embraced in the terms of said act of Congress. It then alleges that the city had granted a new telephone company, a rival of the complainant, the right to erect poles and wires along many of the same streets and routes which the complainant then occupied, and to put many of its poles along side the poles of the complainant. It alleges that the city claims the right not only to prevent the company from erecting new poles and wires and extending its lines, but to make it remove its then existing poles and wires. That the officers of the city alleged that the complainant had no right to occupy said streets and alleys of the city. That the ordinances before mentioned are a constant menace to its rights and privileges and intended to deter persons from making contracts with it. That its contract rights, franchise, and property will be destroyed, unless afforded protection asked for in the bill, and to that end prays that the city may be restrained and enjoined from "removing or interfering with

its poles and wires in said city, and from interfering with the right of your orator to use said poles and wires, and that all proceedings by said city or its agents and others to prevent your orator from continuing, renewing, repairing, and extending its lines, wires, and poles in, along and over the streets and alleys of the said city, and to inflict fines and penalties on your orator for so doing, may be restrained and enjoined; that the right of your orator to use said poles and wires and to carry on its said business along and over the streets of the said city be declared and defined; that the ordinances of said city of the 14th of December, 1894, and of the 10th of September, 1895, so far as they undertake to prevent your orator from maintaining and using its lines, poles, and wires over and along the streets and alleys of the city of Richmond from repairing, renewing, and extending its said poles, wires, lines, and routes as its business may require may be declared *null* and *void*."

With the bill were filed the exhibits which have already been referred to.

On the 16th day of November, 1896, the city filed its demurrer to the bill, and for causes of demurrer alleged: That the bill was insufficient. That the act of Congress of July 24, 1866, does not apply to the complainant, but only to telegraph companies. That the said act, even if it applied to the complainant, does not give it any right to run its lines along the streets of the city without its consent and subject to reasonable regulations both as to occupancy of the streets and compensation for such use. That, if the act of Congress put the complainant as free of control of the city as it claimed in said bill, it is unconstitutional and void. That the manner of determining as to the routes of the poles and wires of the complainant and the compensation to be paid to the city was agreed upon in said ordinance of June 26, 1884, upon condition that the city should reserve the right to repeal said ordinance and require the complainant to remove its poles and wires as provided in said ordinance. That the said ordinance of July 26, 1884, was an agreement between the city of Richmond and said company, and the city in passing said repeal ordinance of December 14, 1894, was merely exercising the right reserved in said agreement. That under the Statute of Virginia referred to in said bill, respondent was given authority to reserve such power of revocation. That the power of such revocation had been properly exercised in said ordinance of December 14, 1894.

By consent, the hearing on said demurrer and restraining order was postponed until January 14, 1897, on which day the cause came on to be heard on said demurrer.

On January 24, 1897, the court filed an opinion overruling the demurrer. (See pp. 35 to 40.) And on March 15, 1897, entered an order, in accordance with said opinion overruling said demurrer, continuing the injunction until the further order of the court, and gave leave to the city to file its answer.

On March 30, 1897, the city filed its answer.

The city admitted that since 1884 the complainant had been maintaining and operating a telephone exchange, and had erected its poles and run its wires along the streets of said city; but denied that it had carried on said business, or used said streets for such purposes under any authority, except that of the City Council of Richmond and the Legislature of Virginia. The city called for proof of the alleged agreement between the complainant and the Western Union Telegraph Company. It denied that the sending of any messages over the wires of the complainant to be transmitted subsequently over the wires of said telegraph company to points outside of the State of Virginia was interstate commerce; or that such was a necessary part of the business of complainant. It denied that the said wires, poles and lines of the complainant constituted a part of the postal service of the United States, or that the business of the complainant was essential to the business of its subscribers for communication outside of Virginia. It denied that the business and status of the complainant, so far as it concerned its Richmond exchange and its poles and wires on the streets of said city was a telegraph company. It alleged that, while the complainant may have been chartered as a telegraph company, yet that, so far as its Richmond exchange was concerned, it did no business as a telegraph company. It denied that the complainant was entitled to the protection given by the provisions of said act of Congress of July 24, 1866. It insisted that the departments of the United States Government, located in Richmond, only used said telephone exchange as any other subscriber did. It denied, and called for proof, that the complainant ever erected any poles or wires in said streets and alleys before applying to said city for permission so to do. It admitted the passage of the ordinance of June 18, 1891, as to the joint use of poles; and alleged the same reasons which have been heretofore stated for its passage. It denied knowledge of any threats hav-

ing been made that the business of the complainant would be ruined, and asserted that no such threats were authorized by the city. It admits the passage of the repeal ordinance of December 14, 1894. It alleged that the Council intended, before the lapse of the twelve months required to make the repeal ordinance effective, to pass a general ordinance relating to telephone poles and wires; and did pass two such ordinances, approved September 10, 1895, copies of which are filed as exhibits with the bill. It denies that, if the complainant filed a petition for the circumstance of its poles, it would have to agree to remove them should it fail to obtain such permission. It denies the construction put upon its reserved power to repeal, and the effect of said repeal ordinance. It denies that the acceptance of said act of Congress rendered the complainant independent of the control of the city of Richmond as to the poles and wires erected under the ordinance of June 26, 1884, and insisted that, having entered under the contract contained in the last mentioned ordinance, it was bound to obey in law the terms of that contract. It denies that telephone companies were intended to be embraced in the scope of said act of Congress. It admits that it has allowed the Richmond Standard Telephone Company to erect its poles and wires on certain streets and alleys of the city of Richmond; the latter company having accepted the terms of said ordinances approved September 10, 1895. It asserts that had the complainant company accepted the terms of said ordinances, then the Standard Company, had it entered at a latter date, would have been obliged to have placed its wires, as far as practicable, on the poles of the complainant company; and insists that the complainant company having refused to accept said terms, and the Richmond Standard Company having erected its poles in pursuance of said terms, the complainant company must, when it run its wires under any authority, place them upon the poles of the Richmond Standard Company in accordance with the terms of the ordinance of September 10, 1895, as to the joint use of poles. It alleges that it had expressed no intention of giving any order to any of its officers to cut down the poles of the complainant company, and had done nothing to justify such fear.

The ordinance of September 10, 1895, filed as Exhibit H with the bill of complaint, provides a method for testing when a telephone pole is unlawfully in the street. That method is to summon the offender

before one of its courts of lawful jurisdiction, and there have the right determined.

At May rules, 1897, the complainant company filed its replication. The evidence was then taken by both sides; but was taken by way of consent, as will be seen in the statement of the evidence on pages 51 to 88; and a statement of agreed facts from pages 88 to 90. The evidence so introduced and the facts agreed have been already sufficiently stated in the statement of the case as not to need repetition.

On the 23d of August, 1897, the Circuit Court entered the decree above complained of. On the 28th day of August, 1897, the city moved the Court to modify its decree "in this cause of August 23, 1897, by inserting therein after the words 'construct and operate the same,' the following words, to-wit: 'So far as to receive from and deliver to the Western Union Telegraph Company messages sent from beyond the limits of the State of Virginia, or to be sent beyond the said limits,' and by inserting therein after the words 'interfering with the exercise of the aforesaid rights by the complainant company,' the following words, to-wit: 'So far as the reception from and delivery to the Western Union Telegraph Company of any message sent from beyond the limits of the State of Virginia, or to be sent beyond said limits,' but the counsel for the complainant objected, and the Court, intending by said injunction to enjoin the city from interfering with the local business and messages, as well as those of an interstate character, doth decline and refuse to so modify said decree."

The city duly filed its petition of appeal from said decree of August 23d, and stated its assignment of errors as follows:

ASSIGNMENT OF ERRORS.

1st. The Court erred in entering said temporary restraining order.

2d and 3d. That the Court erred in not sustaining the city's demurrer, and in overruling the same, and in entering the decree of March 15, 1897.

4th. That the Court erred in the said decree of August 23d in failing to pass upon the effect had upon the alleged rights of the complainant by the said statue of Virginia and the said city ordinance of June 26, 1884.

5th. That there is error in said decree because a telephone company is not a telegraph company under said act of Congress.

6th. Because if said act of Congress does embrace telephone companies, it only embraces such as do an interstate business and only to the extent of its interstate business; while the complainant only does a local business.

7th. Because, even if the complainant does an interstate business it also does a purely local business, and yet the Court in its decree refuses to recognize such a distinction, and enjoins the city from interfering with the business of the company, even as to messages sent from one point in the State to another, or even from one point in the city to some other point therein.

8th. Because there was never any contract between the complainant company and the Western Union Telegraph Company which made the telephone business of the complainant company, or any part of it, interstate commerce.

9th. Because if there ever was any such contract it terminated on the 1st day of November, 1896.

10th. That even if there now existed any such contract which made any of the messages be of the nature of interstate commerce, yet the city should not have been enjoined from interfering with the business of the company as to messages sent from one point of the State to another, or from a point in said city to some other point therein.

11th. Because the decree gives the complainant the unrestricted right to erect poles anywhere in said city without being subject to the said ordinance of September 10, 1895, filed as Exhibit "G" with the bill of complaint, or in any of its provisions.

The appeal to the Circuit Court of Appeals for the Fourth Circuit was decided on February 1st, 1898. In the opinion of the majority of the Court, being Judges Simonton and Purnell, all of said assignments of errors, except the eleventh, was in substance overruled, though not specifically. The eleventh assignment was only held good in part. As to it, the Court said as follows:

"This being so, the injunction granted by the Circuit Court is too broad in its language and effect. There should have been the recognition of a proper exercise of the police power by the municipal corporation, and the use by the complainant of its poles and lines should have been declared to be subject to such regulations and restrictions as may now or may be hereafter imposed by the City Council of Richmond, in the proper and lawful exercise of the police power.

"The only remaining question is, do the ordinances of the city of

Richmond prescribe regulations which will make the use burdensome and intolerable, and practically impossible?

"It belongs to the Legislature to exercise the police power of the State, subject to the power of the courts to adjudge whether any particular law is an invasion to rights secured by the Constitution. (*Mugler* vs. *Kansas*, 123 U. S. 623.) The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business of or impose any unnecessarily restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts. (*Lawton* vs. *Steele*, 152 U. S. 137.) If this be the case with regard to the Legislature, *a fortiori* it applies to a municipal corporation, the creature of the Legislature.

"On examination of these ordinances it will be seen that as a condition precedent to the use of the streets of Richmond, a petition must first be filed for the purpose of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of that ordinance, and such other conditions as the Council may see fit to impose. (Ordinance approved 10th September, 1895.) The 7th section of this ordinance expressly reserves to the City Council the right to put at any time other restrictions and regulations. And the whole tenor and effect of the ordinance is to put the company absolutely under the control of the city. And the terms of the ordinance are enforcible under heavy penalties. The next ordinance, the one providing for wires in conduits, after providing that the City Council may compel the removal of wires from poles overhead in certain streets, and the putting them in conduits in certain streets, under a penalty of not less than $100 or more than $500 for each pole per week, provision is made for permission to build conduits of sufficient capacity to accommodate the wires in such streets, and to provide for an increase thereof to at least the extent of 100 per cent., the increase of space not to be occupied by the party building the conduits without the consent of the Council, the conduit to be used for the wires of the Council free, and the City Council to allow any other person or corporation to use such conduit for wires upon paying compensation in the mode prescribed by the City Council. This privilege of building and owning conduits to last no longer than fifteen years, at the end of which time the city may put other restrictions, conditions, and charges as it may see fit, or may order their removal at the expense of

the owner. The charge for using or owning any wire in any such conduit shall be for each year until January 1, 1900, $2.00 per wire per mile. After January 1, 1900, such larger commission for the rest of the term as the City Council may see fit. These are some of the conditions now imposed with the right to impose any others which Council may see fit. Now it goes without saying that if the complainant, notwithstanding its claim of protection under the act of Congress of 1866, were willing to file a petition to the City Council for the privilege of using its streets and alleys, and in that petition agreed, in consideration of its grant, to abide by any present or future condition, regulation or restriction the Council may impose, this would be a binding contract, and would control the complainant. (*R. R. Co.* vs. *Ryan* 153 U. S. 436.) Whatever the rights of the complainant may have been under such a stipulation, it would surrender them and come within the absolute domination of the City Council. The courts could not review any ordinance to discover if it be within the lawful exercise of the police power, for the complainant would be bound by its contract to obey the ordinance, be it police regulation or not.

"These conditions, regulations, and restrictions already prescribed by the City Council appear to be stimulated by a desire to press and control, perhaps defeat, the existence of the complainant, and so are not the lawful exercise of the police power.

"Let the case be remanded to the Circuit Court with instructions to modify the terms of the injunction therein granted, so that it may conform to the principles declared in this opinion, the costs of the case to be equally divided between the parties."

Judge Brawley delivered the following dissenting opinion:

"I concur in the result, but am not inclined to assent to so much of the opinion as holds that a telephone company, such as is described in this case, and whose business is local in character, is within the purview of the act of Congress of July 14, 1866, relating to telegraph companies."

REASONS FOR MOTION TO ADVANCE.

The said city, in submitting said motion, offers the following reasons why the said cause should be advanced, and an early day fixed for its hearing:

First. The questions involved are of great importance to all the municipalities of this nation, because they most materially concern the extent and the limits of their power over the construction and operation of telephone companies in their midst.

Second. As the questions are of such great interest to so many governmental bodies it is most desirable, if not absolutely necessary, to have said questions settled speedily as well as authoritatively.

Third. Municipal government, not being for private gain or interest, but for the public good, should, it is respectively submitted, be entitled to some preference in matters seriously affecting the performance of its duties and the proper exercise of its power. Governmental agencies, in cases affecting the performance of delegated duties, should have precedent over private causes, since they affect the interests of so many.

Fourth. While outside of the Fourth Circuit the decree complained of in the Circuit Court of Appeals for that circuit is only persuasive authority, yet it is the declared law of every city and town in States of Maryland, Virginia, West Virginia, North and South Carolinas, which are embraced in said circuit. We submit that so wide-reaching a decision, affecting the exercise of governmental powers in so many municipalities, should be finally passed upon by this Court as soon as possible.

Fifth. The questions involved are also of great importance to all of the telephone companies. If the decision in this case is the law of the land, many of them are submitting to restrictions, limitations and burdens, which the lower courts in this case have declared is in violation of the rights conferred by an act of Congress.

Sixth. That the Circuit Court of Appeals erred in deciding that a telephone company is embraced in the act of Congress of July 24, 1866.

Seventh. That the Circuit Court of Appeals erred in holding that the complainant comes within the protection of the said act of Congress. 1st. Because its business is of a local and not of an interstate nature. 2d. Because, even if the complainant is entitled to the protection of said act as to its business in connection with the Western Union Telegraph Company, yet it was not put by said act above municipal control as to its purely local business, viz.: messages which never left the limits of the city, much less the limits of the State.

Eighth. The Circuit Court of Appeals erred in holding that,

although the lines of the complainant were erected and constructed under the terms set forth in the contract—ordinance of June 26, 1884—yet that the company had the right to remain in occupancy of the streets of your petitioner after said ordinance had been repealed by a valid ordinance.

Ninth. The Circuit Court of Appeals erred in holding that the restrictions and conditions set forth in the two ordinances heretofore mentioned of your petitioner, and approved September 10, 1895, and commented upon in the opinion of that court, were void as not being lawful exercise of the police powers of your petitioners.

Tenth. The said city respectfully represents that it is entitled to an early final decision of the questions involved in this cause. As a city it has had delegated to it powers affecting the interests of nearly one hundred thousand people. It should not be improperly restrained from the exercise of those powers. If its views and contention as to said questions are correct, it has been since the 6th day of October, 1896, restrained and prevented from the exercise of certain of its powers, bearing most materially upon its control over snd management of its highways. It was on that day enjoined as set forth in the above statement of facts. Therefore the city has not merely suffered some wrong in the past, but by said injunction and the decrees complained of, is daily suffering a wrong, and will continue to do so until this court shall finally decide this cause. For about two years the appellee company has, in opposition to the ordinances of said city, been occupying its streets with its poles and wires. It has during that time, of its own will and against the consent of the city, put up many new poles and wires wherever it has seen fit. It is true that it has notified the city of its intention from day to day, but such notification was useless in the light of the decrees here complained of.

Eleventh. As long as said decrees stand unreversed the said city is unable to deal justly with any other telephone company desiring to use its streets or highways under contracts set forth in proper ordinances. There is now a telephone company in operation in said city under the terms of the ordinance of September 10, 1895, filed as Exhibit "G" with the bill in this cause. While the said company complies with the terms of said ordinance, yet the city feels that it is not fair to have one company under said terms and the appellee company existing of its free will, unrestrained by any present ordinance, such being the result of the decrees of the lower courts. It is

true that the said company has not conformed to the conduit ordinance filed as Exhibit "H," the reason being that the city has felt that it would be unjust to enforce that ordinance against said company while the appellee company cannot be brought within its terms.

Twelfth. The appellee company cannot object to an early hearing by this court, for the reason that its present uncertain tenure must affects its finances unfavorably.

In submitting this motion the said city does not cite any of the authorities showing errors in the decrees of the lower courts, for the reason that it believes that such questions are not considered upon this motion. But if the Court should deem such questions pertinent to this motion, then the said city asks the Court to examine the brief filed by it with its petition for a writ of *certiorari*. The said brief fully discusses the said errors complained of.

For the reasons above given the city prays that its motion to advance may be granted.

THE CITY OF RICHMOND,
By HENRY R. POLLARD,
City Attorney.

IN THE

Supreme Court of the United States.

March Term, 1898.

CITY OF RICHMOND, APPELLANT,

vs.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, APPELLEE.

BRIEF OF CITY ON PETITION.

To the Honorable Judges of the Supreme Court of the United States:

Your petitioner, the City of Richmond, respectfully shows to the Court as follows:

The appeal in this case to the United States Circuit Court of Appeals for the Fourth Circuit was taken from a decree of the Circuit Court of the United States for the Eastern District of Virginia, en-

tered on the 23d day of August, 1897, in the suit therein pending of Southern Bell Telephone and Telegraph Company v. City of Richmond.

By said decree it was adjudged that the said company has under the protection of a certain act of Congress, approved July 24, 1866, "the right to construct, maintain, and operate its lines over and along the streets and alleys of the city of Richmond, both those now occupied by the complainant company, and those not now so occupied, and to put up, renew, replace, and repair its lines, poles, and wires over and along said streets and alleys as well as to maintain, construct the same, and to connect its lines with new subscribers along said streets and alleys, and the said city of Richmond, its agents, officers, and all others are enjoined and restrained from cutting, removing, or in any way injuring the said lines, poles, and wires of the complainant company, and from preventing or interfering with the exercises of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising said rights."

STATEMENT OF CASE.

On July 24, 1866, Congress passed the act above mentioned "to aid in the construction of telegraph lines," &c., and provided therein as follows: "Any telegraph company which was then organized, or might thereafter be organized, under the laws of any State, and which should file a written acceptance with the Postmaster-General of the restrictions and obligations of said act, should have the right to construct, maintain and operate lines of telegraph, over and along any of the military roads and post-roads of the United States which had then or might thereafter be declared such by law."

On the 11th day of December, 1879, the appellee was chartered as a telegraph company. At that time there was in existence a telephone company known as the National Bell Telephone Company, and which had, on the 10th day of November, 1879, entered into a cer-

tain contract with the Western Union Telegraph Company acting for itself and certain other companies. Such portions of said contract as are supposed by the appellee to throw light upon the subject of this litigation are set forth in the record of this case upon pages 60 to 66. By article 1, section 1 of that contract the National Bell Telephone Company contracted to pay a certain royalty to the Western Union Telegraph Company upon all telephones used in the United States under license of the National Bell Telephone Company. By section 1, article 2, the word telephone is defined as "an instrument for electrically transmitting or receiving articulate speech." By article 6 the Western Union Telegraph Company agreed to withdraw from the manufacture, rental and use of telephones. By article 7 the Western Union Telegraph Company agreed to allow the National Bell Company to use any of its poles, fixtures, &c., upon reasonable terms. By section 2, article 12, a telephone "exchange" is defined. By section 1, article 13, telephone exchanges may be connected, provided they are not used for the transmission of general business messages, &c., in competition with the business of the Western Union Telegraph Company. In article 14 it is agreed that the National Bell shall furnish the Western Union with telephones for use in connection with telephone lines of said telephone company. In article 15 it is provided for the delivery of messages received from telephone lines and to be delivered over the telephone lines, or received over telephone lines and to be delivered over telegraph lines; and provides for a telephone connection between the office of the telegraph company and the office of the telephone exchange. By article 17 it is provided that the contract was to go into effect on the 1st of November, 1879, and to remain in force until the expiration of seventeen years thereafter; and further shows that the Richmond exchange was not embraced within the scope of the contract; that city being embraced in the terms of a contract between said Western Union Telegraph Company and said National Bell Telephone Company with James M. Ormes, dated August 26, 1879.

Subsequently the National Bell Telephone Company was merged into the American Bell Telephone Company, and the Ormes contract afterwards became the property of the Southern Bell Telephone and Telegraph Company. See record, p. 75. On September 1, 1888, the Southern Bell Telephone and Telegraph Company surrendered to the American Bell Telephone Company its privileges under the Ormes contract. See record, p. 75. And on the same day entered into a contract with the American Bell Company for the use of its telephones upon certain terms and conditions. (See pp. 66 to 75, record.)

By the surrender of the Ormes contract the Richmond exchange came within the scope of the above-mentioned contract of November 1, 1879. Several years previous to such surrender, the Ormes contract, so far as it pertained to the city of Richmond, became the property of the Southern Bell Telephone and Telegraph Company. For in 1884 that company applied to the city of Richmond for permission to erect poles in and run wires along the streets and alleys of the said city for telephonic purposes.

On June 26, 1884, the city of Richmond granted such permission under the provisions of an ordinance, a copy of which is filed with the complainant's bill as Exhibit K., page 31. By section 1 of that ordinance the company was authorized to erect such poles and run such wires on the streets of said city on such routes as the Committee on Streets may from time to time designate "upon the conditions and under the provisions of this ordinance." Section 2 required that it should carry certain wires of the city fire alarm and police telegraph. Section 3 required that it should furnish telephonic service to the city at a special reduction of $10 per annum for each municipal station. Section 4 forbid it from injuring shade trees. Section 5 read as follows: "The ordinance may at any time be repealed by the Council of the city of Richmond; such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law." It was under the provisions of this ordinance that the Richmond telephone ex-

change or plant was established by the complainant. No poles were erected or wires run by said company, except under the said ordinance. (See answer, page 43, record.)

On the 13th of February, 1889, nearly five years after it had accepted and worked under said ordinance, the said company filed its acceptance with the Postmaster-General of the above-mentioned act of Congress of July 24, 1866.

On the 18th day of July, 1891, the City Council passed an ordinance as to the joint use of poles erected in the city of Richmond for the support or wires used in connection with the transmission of electricity. Its general object was the diminution or the prevention of increase of poles for carrying wires for electrical purposes. That purpose was to be accomplished by requiring, so far as possible, the several companies running wires for different electrical purposes to hold and use the necessary poles jointly, instead of each company having its own poles, and thereby greatly encumbering the streets of the city of Richmond. The complainant company strenuously objected to said ordinance and refused to accept it. (See bill of complainant; page 7.) Such refusal was one of the reasons that caused the City Council afterwards to repeal the said ordinance of June 26, 1884, granting, as above stated, the privileges to the complainant company. Page 43.

Subsequently, in 1894, there was some correspondence between the City Engineer, speaking for a committee of the City Council known as the Committee on Grounds and Buildings, and Mr. McCluer, Superintendent of the Southern Bell Telephone and Telegraph Company, at Richmond office, in regard to the desire on the part of said committee that the complainant company should furnish free telephone service to the offices of several of the city officials. The complainant company, through Mr. McCluer, declined to furnish such free service. (See pp. 15 to 18.)

For several years previous to 1894, the Southern Bell Telephone and Telegraph Company has had its office connected with the office

of the Western Union Telegraph Company by telephone wires, and there connected with three sets of telephones received from the American Bell Telephone Company and used for receiving from and delivering to subscribers of the Southern Bell Telephone and Telegraph Company messages which were sent to and received from points in and without the State of Virginia and in foreign countries over the wires of the Western Union Telegraph Company. The method of use was as follows: A subscriber of the Southern Bell Telephone and Telegraph Company desiring to send a telegram over the Western Union lines calls up the Western Union office through his 'phone. "The clerk of the Western Union Telegraph Company at the 'phone in its office receives the message through the 'phone, puts it in writing and hands it to the operator of the Western Union Telegraph Company, who transmits it over the wires of the latter company to its destination. When a telegram is received from a point outside of Richmond over the wires of the Western Union Telegraph Company to be sent to a subscriber of the Southern Bell Telephone and Telegraph Company, the Western Union operator, who receives the message, puts it in writing and hands it to the 'phone clerk of the latter company, who has charge of one of the 'phones in its office in Richmond, who calls up the person to whom the message is directed over the 'phone and delivers it to him through the 'phone." (Page 85.) This system of assisting each other was in use when the bill in this case was filed.

In December, 1894, the City Council of Richmond referred to its Committee on Streets for its consideration and subsequent report a draft of an ordinance of a general nature as to underground conduits. (See p. 88, record.)

No more effect could be given to such a general ordinance as to conduits than could be given to the ordinance as to the joint use of poles, as long as the Southern Bell Telephone Company franchise was in force; so at the same meeting the Council repealed the said ordinance of June 26, 1884. (See p. 18, record.) This repeal ordinance was

approved December 14, 1894, and declared that "in accordance with the fifth section of said ordinance of June 26, 1884, all privileges and rights granted by said ordinance shall cease and be determined at the expiration of twelve months from the approval of this ordinance by the Mayor." On the 17th of that month the said Committee on Streets requested the telephone and telegraph representatives to appear before it and discuss the question of a general conduit ordinance. Later in the same month the superintendent of the Western Union Telegraph Company in said city appeared and discussed the matter, which was referred to the City Attorney and City Engineer for their suggestions. On the 28th day of February, 1895, the same city officials were instructed by said committee to prepare and submit " a general ordinance as to telephone conduits." See p. 88. That instruction resulted in the preparation and adoption by the City Council of the two ordinances filed with the complainant's bill as Exhibits "G" and "H" respectively. Both of these ordinances were approved September 10, 1895.

The ordinance filed as Exhibit "G" prescribed that no pole now erected in the city for the support of wires should remain on any street after a certain date, unless the owner or user should first petition for and obtain the privilege of erecting poles and wires for telephonic purposes in accordance with the conditions of that ordinance. It required that all such poles should be used jointly by the several companies running wires for electrical purposes, requiring heavy current wires to be placed on one set of poles and light current wires to be placed upon another set. It subjected the poles and their erection to the supervision of the City Engineer. It required such poles to carry the wires of the Fire-Alarm and Police Telegraph Department. It required an annual statement from the owner or user of such poles of their number and locations. It required an annual fee of $2.00 to be paid to the city authorities for every such pole. It contained certain provisions for the purpose of showing that said poles were kept in safe condition and that the wires were properly fastened and properly

insulated, so as to prevent the causing of a fire by the escape of electricity. The Council also reserved the right to put other restrictions and regulaions as to the erection of poles and wires, and to require such poles, as it might from time to time deem proper, to be removed and the wires to be run underground. (See p. 18 to 26, record.)

The said ordinance, filed as Exhibit "H," specified certain streets in the busier and more crowded parts of the city, in which no poles should remain after a specified date; but required that in this portion all wires for the transmission of electricity, except trolley wires, should be run in underground conduits. In order that the city's streets might not be torn up too frequently, to the great inconvenience of its citizens, the ordinance required that any conduit built under its provisions should be built of a sufficient capacity to carry not only the wires then in said streets and alleys, but to provide for the increase thereof to at least 100 per cent., or double the capacity required for present needs, and that the wires of the city should be carried free; and that other companies should be allowed, when they should have obtained the consent of the City Council thereto, to use said conduits upon reasonable compensation to be determined by arbitration. It required certain compensation to be paid to the city for the use of its streets in this manner. It contained minor details specifying that the construction of the conduits and the placing of the wires therein should be subject to the supervision of the proper city officials.

The complainant company refused to accept or operate under either of said ordinances. And instead of recognizing as binding upon it the said repeal ordinance of December 14, 1894, by removing its poles and wires, it went on the 6th day of October, 1896, into the Circuit Court of the United States for the Eastern District of Virginia and filed its bill of complaint in this suit.

PLEADINGS.

Acting under the prayer of the said bill for an injunction restraining the city from interfering with its poles and wires in said streets and alleys, or with the erection of new poles and wires, or with the operation of its business, the Court granted a preliminary order restraining the city of Richmond from "injuring or in any way interfering with the poles, wires, instruments, or business of the plaintiff in said suit along and over the routes in said city now used by it; from interfering in any way with the proper use, maintenance, or repair of said poles, wires, and instruments of said plaintiff; and from taking proceedings to impose fines and penalties on said plaintiff for using, maintaining, or keeping in repair its said poles, wires, and implements until the further order of the Court; but leave is given the defendant upon ten days' notice to move to vacate this restraining order."

The complainant's bill alleges the incorporation of the company under the laws of New York and its residence in said State, and the existence of the city of Richmond as a municipal corporation under the laws of the State of Virginia. It alleges that the company was duly organized and that it has been engaged for about fifteen years in constructing, maintaining, and operating telephone lines in Virginia and several other States; and during that time it has continually maintained exchanges at various places in said States and the said city of Richmond; that it has maintained during that time the poles and wires and necessary instruments and apparatus for telephonic communication, and has erected and maintained, in conducting said business, numerous poles and wires in and along certain streets and alleys in the city of Richmond, and it has erected and maintained said lines, wires, and poles under authority of the Council of the city of Richmond, Legislature of the State of Virginia, and acts of Congress of the United States. That, in the conduct of its business, it has maintained in the city of Richmond an office or telephone exchange con-

nected by wires with a large number of subscribers, and with the office of the Western Union Telegraph Company in said city; that many of said subscribers are connected through said exchange with the office of the Western Union Telegraph Company, and many of said subscribers do, transmit and receive through their instruments on said premises, through said exchange to and from the office of the Western Union Telegraph Company, messages addressed and intended to be sent and received, and which are sent to and received from points in other States, in the District of Columbia, and foreign countries; your said orator having for years received and transmitted such messages in this manner under agreement still in force; and it also has subscribers outside of the city of Richmond, whose 'phones connect with the other 'phones of your orator in said city, by and through the means of wires and poles of your orator located on and along the streets and alleys of said city, many of which customers have no ready and convenient access to said Telegraph Company except through the use of your orator's wires and poles for the transmission and receipt of telegrams between them and points outside the State of Virginia, and use said 'phones, wires, and poles of your orator in connection with said Western Union Telegraph Company, for that purpose, under and by virtue of an agreement between your orator and said Western Union Telegraph Company for the joint use of the poles and fixtures for said companies in sending and receiving such messages; and that part of such transmission from the office of your orator's subscribers to and from the office of the Western Union Telegraph Company, of messages addressed and sent by telegraph to and from points outside of the State of Virginia, to the District of Columbia, and to foreign countries, is interstate commerce, and is commerce between said points outside of the city of Richmond and the city of Richmond and other States and the District of Columbia and foreign countries, and is a necessary part of the business of your orator, and that its said wires in the city of Richmond, and its poles, to which they are attached, are used for that purpose."

The bill also alleges that it is the intention of the company to extend its business and lines across and beyond the city of Richmond, and State of Virginia, and into other countries and States. It alleges that its wires, poles and lines in said streets and alleys of the city of Richmond constitute a part of the postal service of the United States; that every day it has to connect many of its subscribers with the office of the Western Union Telegraph Company for purposes of communication by means of the lines of said telegraph company between said subscribers in Richmond and their correspondents in other States. It alleges that its continuance as a telephone exchange is an essential and necessary part of the business of its subscribers; that its business and status is that of a telegraph company under the laws of the United States. It alleges its filing its acceptance of said act of Congress of July 24th, 1866; and that by virtue of said acceptance it is entitled to operate lines of telephones over and along the post-roads of the United States, and that the streets, alleys and highways of the city of Richmond are among such post-roads. It further alleges that the several departments of the United States located in Richmond used the lines and wires of said company for transmission by telephone of instructions, orders and information in the administration of governmental affairs. It alleges that, in addition to its rights under said act of Congress, it was duly authorized to construct and maintain said telephone lines under stection 1287 of the Code of Virginia (1887) along and over the streets and alleys of any city in said State, with the consent of the Council thereof. That, relying on its rights, it erected poles and wires in said streets and alleys and conducted its business therein and executed many contracts to furnish telephonic facilities to residents of Richmond, persons outside of said city, and to the officers and agents of the Federal Government. It alleges that under the said act of Congress it is entitled to maintain and operate its lines without regard to the consent of said city, and did, in fact, locate many poles and wires and began operation of its business without such consent. It alleges that the city did, on the 26th day of June, 1884,

after it had begun to operate its business in pursuance of section 1287 of the Code of Virginia, pass the ordinance giving its permission to erect poles and run suitable wires upon the streets of said city, and states further, in substance, the terms of said ordinance and filed with the bill a copy of said ordinance as Exhibit "K;" that, after the passage of said ordinance and in pursuance of the terms thereof and relying thereon as well as on the rights granted by the laws of the United States and State of Virginia, hereinbefore referred to, and before the attempted repeal of said ordinance, it erected poles and wires and operated telephone lines along and over the said streets of the city of Richmond. It alleges that while it was so conducting its business the city of Richmond, through its officials, began to make demands not only outside of its agreements with said city, but which were injurious to the company's business. It then alleges the passage of the ordinance of July 18, 1891, as to the joint use of poles. It alleges that threats were made by some of those in authority in said city that, unless the company submitted to the requirements of the last-named ordinance, it would be driven from the city. It alleges that early in the year 1894 a demand was made upon the company for a number of free 'phones for the use of the city officials. It filed with its bill the correspondence about free 'phones between the City Engineer and Mr. McCluer, which has already been alluded to. It alleges that many threats were made of driving the company from the city, if the demands for free 'phones were not granted. It alleges the passage of the repeal ordinance of December 14, 1894, and files a copy as Exhibit "F." It alleges the passage of the two ordinances approved September 10, 1895, above mentioned, and files copies of the same as Exhibits "G" and "H." It alleges that the power to repeal an ordinance does not contain the power to compel the removal of the poles and wires.

It alleges that the repeal ordinance cannot be construed to mean that such removal shall take place, and alleges that the reserved power of repeal and the repeal ordinance itself was only intended to prevent

the granting of new routes by the Committee on Streets. It also insisted that the fifth section of said ordinance of June 26, 1884, reserving the right of repeal was *null and void* upon the ground that the City Council had no power to repeal, and that such power lay entirely in the Legislature of Virginia under section 1290 of the Code of Virginia. It further insisted that, having accepted the provisions of the act of Congress, it was entitled to the rights given by said act independent of, and superior to, that of the city of Richmond. It insists that telephone companies are embraced in the terms of said act of Congress. It then alleges that the city had granted a new telephone company, a rival of the complainant, the right to erect poles and wires along many of the same streets and routes which the complainant then occupied, and to put many of its poles along side the poles of the complainant. It alleges that the city claims the right not only to prevent the company from erecting new poles and wires and extending its lines, but to make it remove its then existing poles and wires. That the officers of the city alleged that the complainant had no right to occupy said streets and alleys of the city. That the ordinances before mentioned are a constant menace to its rights and privileges and intended to deter persons from making contracts with it. That its contract rights, franchise, and property will be destroyed, unless afforded protection asked for in the bill, and to that end prays that the city may be restrained and enjoined from "removing or interfering with its poles and wires in said city, and from interfering with the right of your orator to use said poles and wires, and that all proceedings by said city or its agents and others to prevent your orator from continuing, renewing, repairing, and extending its lines, wires, and poles in, along and over the streets and alleys of the said city, and to inflict fines and penalties on your orator for so doing, may be restrained and enjoined; that the right of your orator to use said poles and wires and to carry on its said business along and over the streets of the said city be declared and defined; that the ordinances of said city of the 14th of December, 1894, and of the 10th of September, 1895, so far as

they undertake to prevent your orator from maintaining and using its lines, poles, and wires over and along the streets and alleys of the city of Richmond from repairing, renewing, and extending its said poles, wires, lines, and routes as its business may require may be declared *null* and *void*."

With the bill were filed the exhibits which have already been referred to.

On the 16th day of November, 1896, the city filed its demurrer to the bill, and for causes of demurrer alleged: That the bill was insufficient. That the act of Congress of July 24, 1866, does not apply to the complainant, but only to telegraph companies. That the said act, even if it applied to the complainant, does not give it any right to run its lines along the streets of the city without its consent and subject to reasonable regulations both as to occupancy of the streets and compensation for such use. That, if the act of Congress put the complainant as free of control of the city as it claimed in said bill, it is unconstitutional and void. That the manner of determining as to the routes of the poles and wires of the complainant and the compensation to be paid to the city was agreed upon in said ordinance of June 26, 1884, upon condition that the city should reserve the right to repeal said ordinance and require the complainant to remove its poles and wires as provided in said ordinance. That the said ordinance of July 26, 1884, was an agreement between the city of Richmond and said company, and the city in passing said repeal ordinance of December 14, 1894, was merely exercising the right reserved in said agreement. That under the Statute of Virginia referred to in said bill, respondent was given authority to reserve such power of revocation. That the power of such revocation had been properly exercised in said ordinance of December 14, 1894.

By consent, the hearing on said demurrer and restraining order was postponed until January 14, 1897, on which day the cause came on to be heard on said demurrer.

On January 24, 1897, the court filed an opinion overruling the de-

murrer. (See pp. 35 to 40.) And on March 15, 1897, entered an order, in accordance with said opinion overruling said demurrer, continuing the injunction until the further order of the court, and gave leave to the city to file its answer.

On March 30, 1897, the city filed its answer.

The city admitted that since 1884 the complainant had been maintaining and operating a telephone exchange, and had erected its poles and run its wires along the streets of said city; but denied that it had carrried on said business, or used said streets for such purposes under any authority, except that of the City Council of Richmond and the Legislature of Virginia. The city called for proof of the alleged agreement between the complainant and the Western Union Telegraph Company. It denied that the sending of any messages over the wires of the complainant to be transmitted subsequently over the wires of said telegraph company to points outside of the State of Virginia was interstate commerce; or that such was a necessary part of the business of complainant. It denied that the said wires, poles and lines of the complainant constituted a part of the postal service of the United States, or that the business of the complainant was essential to the business of its subscribers for communication outside of Virginia. It denied that the business and status of the complainant, so far as it concerned its Richmond exchange and its poles and wires on the streets of said city was a telegraph company. It alleged that, while the complainant may have been chartered as a telegraph company, yet that, so far as its Richmond exchange was concerned, it did no business as a telegraph company. It denied that the complainant was entitled to the protection given by the provisions of said act of Congress of July 24, 1866. It insisted that the departments of the United States Government, located in Richmond, only used said telephone exchange as any other subscriber did. It denied, and called for proof, that the complainant ever erected any poles or wires in said streets and alleys before applying to said city for permission so to do. It admitted the passage of the ordinance of June 18, 1891, as to the

joint use of poles; and alleged the same reasons which have been heretofore stated for its passage. It denied knowledge of any threats having been made that the business of the complainant would be ruined, and asserted that no such threats were authorized by the city. It admits the passage of the repeal ordinance of December 14, 1894. It alleged that the Council intended, before the lapse of the twelve months required to make the repeal ordinance effective, to pass a general ordinance relating to telephone poles and wires; and did pass two such ordinances, approved September 10,1895, copies of which are filed as exhibits with the bill. It denies that, if the complainant filed a petition for the continuance of its poles, it would have to agree to remove them should it fail to obtain such permission. It denies the construction put upon its reserved power to repeal, and the effect of said repeal ordinance. It denies that the acceptance of said act of Congress rendered the complainant independent of the control of the city of Richmond as to the poles and wires erected under the ordinance of June 26, 1884, and insisted that, having entered under the contract contained in the last mentioned ordinance, it was bound to obey in law the terms of that contract. It denies that telephone companies were intended to be embraced in the scope of said act of Congress. It admits that it has allowed the Richmond Standard Telephone Company to erect its poles and wires on certain streets and alleys of the city of Richmond; the latter company having accepted the terms of said ordinances approved September 10, 1895. It asserts that had the complainant company accepted the terms of said ordinances, then the Standard Company, had it entered at a later date, would have been obliged to have placed its wires, as far as practicable, on the poles of the complainant company; and insists that the complainant company having refused to accept said terms, and the Richmond Standard Company having erected its poles in pursuance of said terms, the complainant company must, when it run its wires under any authority, place them upon the poles of the Richmond Standard Company in accordance with the terms

of the ordinance of September 10, 1895, as to the joint use of poles. It alleges that it had expressed no intention of giving any order to any of its officers to cut down the poles of the complainant company, and had done nothing to justify such fear.

The ordinance of September 10, 1895, filed as Exhibit H with the bill of complaint, provides a method for testing when a telephone pole is unlawfully in the street. That method is to summon the offender before one of its courts of lawful jurisdiction, and there have the right determined.

At May rules, 1897, the complainant company filed its replication. The evidence was then taken by both sides; but was taken by way of consent, as will be seen in the statement of the evidence on pages 51 to 88; and a statement of agreed facts from pages 88 to 90. The evidence so introduced and the facts agreed have been already sufficiently stated in the statement of the case as not to need repetition.

On the 23d of August, 1897, the Circuit Court entered the decree above complained of. On the 28th day of August, 1897, the city moved the Court to modify its decree " in this cause of August 23, 1897, by inserting therein after the words 'construct and operate the same,' the following words, to-wit: 'So far as to receive from and deliver to the Western Union Telegraph Company messages sent from beyond the limits of the State of Virginia, or to be sent beyond the said limits,' and by inserting therein after the words 'interfering with the exercise of the aforesaid rights by the complainant company,' the following words, to-wit: 'So far as the reception from and delivery to the Western Union Telegraph Company of any message sent from beyond the limits of the State of Virginia, or to be sent beyond said limits,' but the counsel for the complainant objected, and the Court, intending by said injunction to enjoin the city from interfering with the local business and messages, as well as those of an interstate character, doth decline and refuse to so modify said decree."

Your petitioner duly filed its petition of appeal from said decree of August 23d, and stated its assignment of errors.

ASSIGNMENT OF ERRORS.

1st. The Court erred in entering said temporary restraining order.

2d and 3d. That the Court erred in not sustaining the city's demurrer, and in overruling the same and in entering the decree of March 15, 1897.

4th. That the Court erred in the said decree of August 23d in failing to pass upon the effect had upon the alleged rights of the complainant by the said statute of Virginia and the said city ordinance of June 26, 1884.

5th. That there is error in said decree because a telephone company is not a telegraph company under said act of Congress.

6th. Because if said act of Congress does embrace telephone companies, it only embraces such as do an interstate business and only to the extent of its interstate business; while the complainant only does a local business.

7. Because, even if the complainant does an interstate business it also does a purely local business, and yet the Court in its decree refuses to recognize such a distinction, and enjoins the city from interfering with the business of the company, even as to messages sent from one point in the State to another, or even from one point in the city to some other point therein.

8th. Because there was never any contract between the complainant company and the Western Union Telegraph Company which made the telephone business of the complainant company, or any part of it, interstate commerce.

9th. Because if there ever was any such contract it terminated on the 1st day of November, 1896.

10th. That even if there now existed any such contract which made any of the messages be of the nature of interstate commerce, yet the city should not have been enjoined from interfering with the business of the company as to messages sent from one point of the State to another, or from a point in said city to some other point therein.

11th. Because the decree gives the complainant the unrestricted right to erect poles anywhere in said city without being subject to the said ordinance of September 10, 1895, filed as "Exhibit "G" with the bill of complaint, or in any of its provisions.

The appeal to the Circuit Court of Appeals for the Fourth Circuit was decided on February 1st, 1898. In the opinion of the majority of the Court, being Judges Simonton and Purnell, all of said assignments of errors, except the eleventh, was in substance overruled, though not specifically. The eleventh assignment was only held good in part. As to it, the Court said as follows:

"This being so, the injunction granted by the Circuit Court is too broad in its language and effect. There should have been the recognition of a proper exercise of the police power by the municipal corporation, and the use by the complainant of its poles and lines should have been declared to be subject to such regulations and restrictions as may now or may be hereafter imposed by the City Council of Richmond, in the proper and lawful exercise of the police power.

"The only remaining question is, do the ordinances of the city of Richmond prescribe regulations which will make the use burdensome and intolerable, and practically impossible?

"It belongs to the Legislature to exercise the police power of the State, subject to the power of the courts to adjudge whether any particular law is an invasion to rights secured by the Constitution. (*Mugler* vs. *Kansas*, 123 U. S. 623.) The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business of or impose any unnecessarily restrictions upon lawful occupations. In other words, its detrmination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts. (*Lawton* v. *Steele*, 152 U. S. 137.) If this be the case with regard to the Legislature, *a fortiori* it applies to a municipal corporation, the creature of the Legislature.

"On examination of these ordinances it will be seen that as a condition precedent to the use of the streets of Richmond, a petition

must first be filed for the purpose of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of that ordinance, and such other conditions as the Council may see fit to impose. (Ordinance approved 10th September, 1895.) The 7th section of this ordinance expressly reserves to the City Council the right to put at any time other restrictions and regulations. And the whole tenor and effect of the ordinance is to put the company absolutely under the control of the city. And the terms of the ordinance are enforcible under heavy penalties. The next ordinance, the one providing for wires in conduits, after providing that the City Council may compel the removal of wires from poles overhead in certain streets, and the putting them in conduits in certain streets, under a penalty of not less than $100 or more than $500 for each pole per week, provision is made for permission to build conduits of sufficient capacity to accommodate the wires in such streets, and to provide for an increase thereof to at least the extent of 100 per cent., the increase of space not to be occupied by the party building the conduits without the consent of the Council, the conduit to be used for the wires of the Council free, and the City Council to allow any other person or corporation to use such conduit for wires upon paying compensation in the mode prescribed by the City Council. This privilege of building and owning conduits to last no longer than fifteen years, at the end of which time the city may put other restrictions, conditions, and charges as it may see fit, or may order their removal at the expense of the owner. The charge for using or owning any wire in any such conduit shall be for each year until January 1, 1900, $2.00 per wire per mile. After January 1, 1900, such larger commission for the rest of the term as the City Council may see fit. These are some of the conditions now imposed with the right to impose any others which Council may see fit. Now it goes without saying that if the complainant, notwithstanding its claim of protection under the act of Congress of 1866, were willing to file a petition to the City Council for the privilege of using its streets and alleys, and in that petition agreed, in con-

sideration of its grant, to abide by any present or future condition, regulation or restriction the Council may impose, this would be a binding contract, and would control the complainant. (*R. R. Co.* vs. *Ryan* 153 U. S. 436.) Whatever the rights of the complainant may have been under such a stipulation, it would surrender them and come within the absolute domination of the City Council. The courts could not review any ordinance to discover if it be within the lawful exercise of the police power, for the complainant would be bound by its contract to obey the ordinance, be it police regulation or not.

"These conditions, regulations, and restrictions already prescribed by the City Council appear to be stimulated by a desire to press and control, perhaps defeat, the existence of the complainant, and so are not the lawful exercise of the police power.

"Let the case be remanded to the Circuit Court with instructions to modify the terms of the injunction therein granted, so that it may conform to the principles declared in this opinion, the costs of the case to be equally divided between the parties."

Judge Brawley delivered the following dissenting opinion:

"I concur in the result, but am not inclined to assent to so much of the opinion as holds that a telephone company, such as is described in this case, and whose business is local in character, is within the purview of the act of Congress of July 14, 1866, relating to telegraph companies."

REASONS FOR WRIT OF CERTIORARI.

Your petition submits the following reasons why the said decree of affirmance should be brought here by writ of certiorari for review by this Court:

First. The questions of law involved in the affirmed decree as above stated are of great importance and general interest, because they very materially concern the extent and the limits of the power of

municipalities over the construction and operation of telephone companies in their midst, and, if allowed to remain unchallenged and settled by said decree of affirmance, will of necessity govern future decrees involving such questions in said circuit, and greatly affect similar litigation arising in other circuits.

Second. As affecting the rights of all telephone companies and the powers of all municipalities in this country, it is most desirable, if not necessary, to have it authoritatively decided. 1st. Whether any telephone company is embraced within the scope of the said act of Congress of July 24th, 1866. 2d. Whether a telephone company doing a *local* business only is within the purview of said act. 3d. Whether a telephone company doing both an interstate and a *local* business is beyond the interference or control of a municipality as to its *local* business as well as its interstate business.

The said opinion and decree of affirmance is in direct conflict with decisions of this court as to the control of State authorities over telegraph messages or freight charges of a local, and not of an interstate character.

Third. It is of great importance that municipalities should know to what extent they can impose restrictions and conditions upon telephone companies using their streets.

Fourth. That the Circuit Court of Appeals erred in deciding that a telephone company is embraced in the act of Congress of July 24, 1866.

Fifth. That the Circuit Court of Appeals erred in holding that the complainant comes within the protection of the said act of Congress. 1st. Because its business is of a local and not of an interstate nature. 2d. Because, even if the complainant is entitled to the protection of said act as to its business in connection with the Western Union Telegraph Company, yet it was not put by said act above municipal control as to its purely local business, viz.: messages which never left the limits of the city, much less the limits of the State.

Sixth. The Circuit Court of Appeals erred in holding that,

although the lines of the complainant were erected and constructed under the terms set forth in the contract—ordinance of June 26, 1884, yet that the company had the right to remain in occupancy of the streets of your petitioner after said ordinance had been repealed by a valid ordinance.

Seventh. The Circuit Court of Appeals erred in holding that the restrictions and conditions set forth in the two ordinances heretofore mentioned of your petitioner, and approved September 10, 1895, and commented upon in the opinion of that court, were void as not being lawful exercise of the police powers of your petitioners.

Your petitioner exhibits as a part of this application a certified copy of the record, decree of affirmance and opinions of the said Court of Appeals.

In view of the nature of the questions of law involved, and in view of the errors complained of, your petitioner prays that this Honorable Court will grant its writ of *certiorari* directed to the Circuit Court of Appeals of the United States for the Fourth Circuit, requiring that the record of the said cause in said court and its decree of affirmance thereof be certified to this court, and that this Honorable Court will, thereupon, proceed to correct the errors complained of, reverse the said decree, and remand the said cause, and give your petitioner such other and further relief as the nature of the case may require and to the court may seem meet in the premises.

THE CITY OF RICHMOND,
Petitioner.

C. V. MEREDITH, Solicitor.

STATE OF VIRGINIA,
CITY OF RICHMOND.

Before the undersigned, a notary public in and for the city aforesaid, personally came R. M. Taylor, Mayor of said city, and made oath that the allegations in the above petition for writ of *certiorari* are true to the best of his knowledge and belief.

Notary Public.

ARGUMENT.

The several questions which materially affect the merits of this controversy are as folllows:

1st. Does the said act of Congress of July 24, 1866, embrace within its scope telephone companies?

2d. Even if it embraces any such companies, does it cover the Richmond Exchange of the complainant company?

(*a*) As to messages sent by 'phone to the office of the Western Union Telegraph Company, thence to be forwarded over the lines of the latter company to some point without the State of Virginia, or messages received from some such point over the wires of said telegraph company at its office, and sent from there over the wires of the complainant company to the intended recipient in Richmond?

(*b*) Even if the act applies to such messages, can it give any protection to telephonic messages sent from one part of the State of Virginia to another, or from one point in the city of Richmond to another?

3d. Do the lines and business of the company "constitute a part of the postal service of the United States?"

4th. Even if the entire business of the company would have been within the scope of said act, had its lines been established after it had accepted the terms of said act, and been constructed under its protection,yet having been constructed and established under the contract contained in said ordinance of June 26th, 1884, can it now refuse to comply with the terms of said contract, and claim as a protection its delayed acceptance of February 13th, 1889?

5th. Did the Council of the city have the power to pass the repeal ordinance of December 14, 1894, and is it sufficiently broad to require the removal of the poles and wires already erected?

6th. The decree of the Circuit Court is erroneous, in that it empowers the company to enter upon and use the streets free from any control or regulation of the city, however reasonable.

7th. The decree of affirmance is erroneous in affirming in the main the decree of the Circuit Court, and also in declaring the provisions and conditions of the two ordinances approved September 10, 1895, to be improper and void.

A discussion of the above questions will be a substantial presentation of nearly all the errors assigned in the record. The few, which will not be so covered, will be subsequently noticed.

Before discussing these points of connection, it may be well to state that there are some questions, which we recognized, need not be here discussed as long as the law pertaining to them shall remain as now declared by the Supreme Court of the United States.

1st. We recognize the constitutionality of the above-mentioned act of Congress. (*Pen. Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S., 1; *Tel. Co.* v. *Texas*, 105 U. S., 460; *West. Un. Tel. Co.* v. *Massachusetts*, 125, U. S., 530; *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S. 92 and 149 U. S., 465.)

2d. We recognize, as declared by act of Congress, that all streets, which are letter-carrier routes, are post-roads. (*St. Louis* v. *West. Un. Tel. Co.*, 148 U. S., 92 and 149 U. S., 465.)

3d. We recognize that under said act of Congress a telegraph company can obtain a right of way for its poles and wires through a city and along its streets against the wish of the municipality. (*St. Louis* v. *West. Un. Tel. Co.*, 148 U. S., 92 and 149 U. S., 465.)

With these questions eliminated, we come to the discussion of the first question in dispute as above stated.

The complainant company claims that it is embraced within the meaning of that act. It claims that the words "any telegraph company" embrace and include telephone companies. As was said by the Supreme Court of the United States in *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S., 92: "This is not the first time that an effort has been made to withdraw corporate property from State control, under and by virtue of this act of Congress."

It may be that messages sent by telephone, like those sent by tele-

graph from one State to another, are a species of interstate commerce. But it would not follow from that that telephone companies are embraced in said act, and entitled to the extraordinary privileges granted thereby. The carrying of passengers and freight are also species of interstate commerce, but it is not pretended that railroads come within the scope of the act; thus railroad companies were omitted from the scope of the act, although well known at the time of its passage as necessary means of interstate commerce. Why then is it claimed that telephone companies are covered by its terms when such companies had never been heard of at the time of the passage of the act? Only because of a partial similarity between a telegraph and a telephone!

In the terms of the act of Congress there is nothing which tends to suggest that the words "telegraph" and "telegram" were intended to be read except in their well known and ordinary acceptations. No better proof of the general acceptation of those terms can be given than the definitions given by the *Albany Evening Journal* of August 6, 1852. That Journal, speaking of the coinage of a new word, said: "It is telegram instead of telegraphic dispatch or telegraphic communication. * * * * Telegraph means to write from a distance. Telegram, the writing itself, executed from a distance." (See Century Dictionary under "telegram.")

It is true that telephone wires, like telegraph wires, carry communications between persons distant from each other. It is true that among the material means necessary for the carrying of such communications, are poles and wires, and that the power used for such transmission is electricity. But there the similarity stops. The art of conveying a message by telegraphic dots and dashes is distinct from that of transmitting a conversation by a telephone. So separate and distinct that the Morse patent for the telegraph did not prevent the issuance of the patent to Bell for the telephone, as for a *"new and unknown art"*—a recognition that the two arts or scientific discoveries were distinct from each other. In the Telephone cases, 126 U. S.,

page 1, the Supreme Court recognized and adjudged that Mr. Bell had not merely discovered a new instrument for the transmission of sound, but had discovered the new and unknown art of transmitting the sounds of articulate speech. And it is because of this difference that the American company and its branch companies have been enabled to reap their royalties. In the contract between the West. Un. Tel. Co. and the National Bell Tel. Co., the words "telephone" is defiled as "an instrument for electrically transmittng or receiving *articulate speech.*" See p. 61, art. 2 (1.)

Thus we submit that the Supreme Court has recognized the clear distinction between a telegraph and a telephonic communication. Surely then a company formed to transmit the former kind of communication is not a company formed to transmit the latter kind—nor do the terms designating one embrace the other.

The chief purpose and use of the telephone originally and at present is communication within limited, if not local, spheres. It is true that it can be used for long-distance communications, but its chief use is for communications between persons in a city or town. It is generally and ordinarily local in its use. Its long-distance uses are rather incidental in comparison with its local or municipal uses, and are only of late birth. It is regarded by the American Bell Telephone Company, the successor to the National Bell Telephone Company, in the contract with the Western Union Telegraph Company in its definition of the word "exchange." See record, p. 61, art. 12 (2.)

In the construction of the words "any telegraph company," as used in the act of Congress, *the effect and extent of the power* conferred by the act should have great weight. While it is true that the power conferred by said act of Congress upon telegraph companies has been adjudged and established, yet it will not be denied that the granting of such power was a great advance upon what had theretofore been regarded as the extent of the power of Congress under the interstate commerce clause of the Constitution. Before the decision of *Pen. Tel. Co.* v. *West. Un. Tel. Co.*, *supra*, the power of Congress as to

interstate commerce had been regarded as confined to protecting such commerce, when existing, from being interfered with by the States; but by the act under discussion Congress claimed the right to enlarge the powers of the instrumentalities of interstate commerce. It ceased confining itself to merely preventing a State from hampering the instrumentalities of commerce, existing within its limits; it claimed the power to authorize such instrumentalities, existing in one State, to enter another, and not only to pass over, but to permanently occupy portions of the highways of that State. "The use which the defendant makes of the streets is an exclusive and permanent one, not one temporary, shifting and in common with the general public." (*St. Louis* v. *West. Un. Tel. Co.*, 148 U. S., 92-98.)

We repeat that it will not be denied that the act confers extraordinary power upon the instrumentality named in it. We call attention, however, to the fact that while Congress thus claimed the right to confer this great power, it did not in fact confer it, except upon *one* of the instrumentalities of interstate commerce, viz., telegraph companies. And we insist that no presumption should be allowed, that it was the intention of Congress to confer it upon any other instrumentality.

"Grants of immunity from legislative governmental control are never to be presumed." (*Ruggles* v. *Illinois*, 108 U. S., 526-531.)

This principle of construction, which is here asked to be applied, is nothing more or less than that the rule applied in the construction of charters or grants of privileges or franchises. No reason can be given why the same rule should not apply. The power given in the said act of Congress is a privilege, and therefore to be construed like any other franchise granted any other corporation. In Cooley's Const. Limt'ns, 6th Ed., p. 487, it is said:

"'When a State,' says the Supreme Court of Pennsylvania, 'means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power which belongs to her, it is so easy to say so, that we will never believe it to be meant, when

it is not said. In the construction of a charter to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation. If the usefulness of the company would be increased by extending (its privileges), let the Legislature say it, but let it be remembered that nothing but plain English words will do it.' This is sound doctrine and should be vigilantly observed and enforced.

"And this rule is not confined to the grant of a corporate franchise, but it extends to all grants of franchises and privileges by the State to individuals, in the benefit of which the people at large cannot participate."

See also *Mills* v. *St. Clair County*, 8 How., 569.

There are serious difficulties as to possession of such power by telephone companies, which do not exist as to telegraph companies. The great multiplication of poles and wires needed for telephone service is no slight evil in cities. The Supreme Court of the United States in *St. Louis* v. *West. Un. Tel. Co.*,148 U. S.,pages 92-99, recognized this evil. The Court said:

"It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. * * * By sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use for purposes of travel entirely appropriated to the separate use of companies and for the transportation of messages."

This is no fancied, but a real evil. The experience of cities teaches that when the streets are open to occupancy of corporations for their instrumentalities of trade, such as gas and water pipes and wires for the various electrical purposes that corporations are formed for the purpose of forcing the earlier and existing corporations to buy them out. In the meantime the streets have been used and occupied and injured for their purposes. The language of Allen, Judge, in *Pierce* v. *Drew*, 136 Mass., on page 85, although used in a dissenting opinion, is entitled to great weight because of its strong statement of facts, known of all men. He says: "When a telegraph line consisted only

of a single row of small posts, with a few wires, the matter was of less importance. But common observation shows that now the posts are large and numerous, fitted with cross beams adapted for layer after layer of almost countless wires; and the establishment of the different kinds of electrical lines involves to some extent a destruction of trees along the highways or streets, an occupation of the ground, a filling of the air, an interference with access to or escape from buildings, an increased difficulty in putting out fires, an obstruction of the view, a presentation of unsightly objects to the eye, and a creation of unpleasantness in the wind."

The use and occupancy of a street by a telegraph company is a matter of but small moment, for its route from its office to the limits of the city are but few, and go through the city as directly as possible. It was doubtless on account of this nature of their occupancy that Congress gave such companies the large power authorized by said act. But the use necessary for a telephone company is of course far greater. It ramnifies a whole city. It goes upon any street where it can get sufficient subscribers. The result is that a large portion of the streets of a city are invaded by the poles and wires of such a corporation. It does not merely pass through, but it permeates a city. If such a company should have given it the power conferred by said act of Congress upon telegraph companies, it would soon be beyond the control of the city authorities, even as to the designation of its routes. Is the company to be allowed to determine upon what and how many streets it will go? Whether it shall confine its lines to present needs, or by its extensions anticipate and prevent competition? Ought the possession of such a power to be recognized unless declared in "plain English words?"

We recognize the tendency of some of the highest courts to take what may be called a business view of questions of this kind, and that they seem to feel it their duty to lean strongly in their decisions towards the maintenance and encouragement of business enterprises. A conservative tendency in that direction is, of course, unobjection-

able. But it would be far beyond the reach of conservatism for a court to hold an act authorizing one class of corporations to enter upon and occupy in part the streets of a city *without its consent* (an invasion rarely ever authorized by a State) embraces another and different class of corporations not known at the time of the passage of the act. The Supreme Court of the United States has in its decisions delivered since the case of *Pen. Tel.* v. *West. Un. Tel. Co., supra*, shows a strong determination to uphold as far as possible municipal control, even over that class of corporations which are specified in said act. *(St. Louis* v. *West. Un. Tel. Co., supra.)*

We submit that the said act as it now reads should not be construed to embrace telephone companies.

We admit that a few decisions can be found construing the words "telegraph companies" to include in its meaning telephone companies. But it will be found upon examination of the cases that the decisions are based upon the phraseology of the respective statutes which were under discussion.

The first case cited in the lower court is *Attorney General* v. *Edison Tel. Co.*, L. R., 6 Q. B. Div., 244. This case was the first one to put such a construction upon those words. It has been in some instances blindly followed. The courts have ignored the fact that the decision turned, not upon what the words meant in their ordinary acceptation, but upon what they meant as used in and defined by the English statutes. In its decision in that case the court went into a detailed discussion of the words of the English statutes. It laid stress on the fact that the English act of 1863 defined a "telegraph" to mean "a wire or wires used for the purpose of telegraphic communication," and that the act of 1869 broadened the meaning still more by declaring that in addition to its meaning under the act of 1863, it should also mean "any apparatus for transmitting messages or other communications by means of electric signals." The decision of the court evidently rested upon the manifest purpose of Parliament to make the words as broad in their meaning as possible. And it should be

remembered that the English act was not, like the act of Congress, one by which a corporation was greatly freed from "legislative governmental control," but was one by which the government declared its purpose to retain very great control over the telegraph. Yet this is the decision which several courts have followed, as if it construed the words in their general acceptation.

The next case is that of the *Wisconsin Tel. Co.* v. *Oshkosh*, 62, Wis., p. 32. In that case the court, after noticing the English case just commented on, said "If there remains any doubt as to the power given to charter a telegraph company being sufficiently broad to include a telephone company, then it must be dispelled by the general clause above quoted from section 1771, to-wit, 'for any lawful business or purpose whatever,' &c., for by a well settled rule of construction these general words extend to things of a kindred nature to those specifically authorized by the section, and hence whatever is of a kindred nature to telegraphing, which most certainly includes telephoning." Can it be said that that decision was based upon a construction of the words telegraph company, or upon the words "for any lawful business or purpose whatever?" Certain it is, that the decision should have been put upon the latter ground, and any assertion that the words telegraph company included a telephone company, was an *obiter dictum*.

In the case of *Cum. Tel. and Tel. Co.* v. *United States*, 42 Fed. Rept., 273, the statement of the facts show that the company derived its rights from an ordinance of the city of Nashville recognizing it as a telephone company.

In the case of *Duke* v. *Cen. N. J. Tel. Co.*, 53 N. Jer. Law., pp. 341-5, the court in discussing the New Jersey act, said:

"Telegraph acts does not define the kind of business in which the corporation shall engage, apart from the provision that the corporators shall subscribe stock for the construction of a telegraph line. The name of stock corporation need not indicate the business proposed to be transacted. Any title can be adapted. The only limitation upon

the scope of the business is that it must be within that for which a line of telegraph, in performing its public functions, is used."

It cannot be disputed that if the court construed aright the New Jersey statute, there was no necessity for that court to attempt to prove that the words "telegraph company" in their general acceptation include a telephone company.

The remaining case cited by the complainant is that of the *Ches. and Po. Tel. Co.* v. *Balt. and Ohio Tel. Co.*, 66 Md., 399. We simply ask the Court to read what the Court says on page 410. It there appears that the Maryland statute called for no effort to enlarge the words "telegraph company."

Such are the authorities offered as reasons why this Court should construe the act of Congress to embrace telephone companies. Each one of them turning upon the peculiar phraseology of the statute then under discussion. Not one of them throws any light upon the intent of Congress, nor upon the terms used in said act of Congress. That act must be construed by three simple rules.

1st. The terms used are to be read according to their "general acceptation;" there being no word of uncertain meaning used.

2d. By the object in the mind of the law-maker at the time of its passage.

3d. By the inconveniences that would arise by construing the words to embrace telephone companies.

We have noticed each of these tests, and need not say more, except to ask that if the act is to be construed to embrace telephone companies, by what section is it declared, that it shall occupy only a route through a city, and was not intended to authorize that net work of wires so frequently attendant upon the establishment of a telephone exchange, and which run upon nearly every street in certain cities. Will it be contended that Congress ever intended such a wide-spread occupation of the streets of a city, because it authorized another class of companies to take their routes through the several cities. Can it be seriously contended that Congress meant to authorize such an

invasion upon the streets of a city for the running of wires when some of them may carry a message to the telegraph company once in a year; others once in several years, and others never? Yet if the act applies at all to telephone companies, it authorizes just such an occupation, for the act puts no limitation upon the number of streets to be occupied. We submit that such a construction of the act will not be adopted unless forced upon the Court by a clear and unavoidable mandate. There being none such, we submit that the Circuit Court erred in decreeing that the company was, "in accordance with the terms and provisions and under the protection of the act of Congress of the United States, approved July 24, 1866, entitled to the injunction set forth in the decree complained of," and also that the Court of Appeals erred in affirming that decision.

II.

Even if telephone companies, doing interstate business or commerce, are embraced in the terms of said act, yet the question still remains whether the Richmond Exchange is of that character—is its business of the nature of interstate commerce?

In discussing this latter question we must notice it in two aspects:

1st. As to the messages sent and received in connection with the Western Union Telegraph Company to and from points outside of the State.

The character of the first stated class of messages is accurately described in "Bell Ex. No. 15," on p. 85, from which we have previously quoted. That quotation shows that the telephone wires merely take the place of the telegraph messenger boy. The message is not transmitted from the telephone wires to the telegraph lines, nor *vice versa*. In one class of messages, which are to be sent beyond the State, the clerk of the telephone company at the 'phone in the office of the telegraph company receives the message through the 'phone, *puts it in writing and hands it to the operator of the Western Union Telegraph Company.* In the other class of messages, which are

received from beyond the State, "the Western Union telegraph operator who receives the message, *puts it in writing and hands it to the 'phone clerk of the (telephone) company*, who has charge of one of the 'phones in its office in Richmond, who *calls up* the person to whom the message is addressed over the 'phone, and delivers it to him through the 'phone. This method of delivering and receiving was done up to November 1st, 1896, under the contract set forth in "Bell Ex. No. 4." As that contract expired on that day, that course has been pursued since that day by silent understanding, without any contract. The company does not allege in its pleadings, nor prove by its evidence, that the Richmond Exchange does any interstate commerce unless through the Western Union Telegraph Company.

In *Coe* v. *Errol*, 116 U. S., 517-528, the Supreme Court had before it, and decided, when the movement of an article becomes interstate commerce. It said:

"'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the State has begun.' But this movemnt does not begin until the articles have been shipped or started for transportation from one State to the other. The carrying them in carts or other vehicles, or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, or never put in course of transportation out of the State. Carrying it from the farm or the forest to the depot is only an interior movement of the property entirely within the State for the purpose, it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing."

In the lower court the company relied upon the line of cases beginning with "Daniel Ball," 10 Wal., ——, and ending with *Railroad Co.* v. *Penn.*, 136 U. S., 114. But we submit that none of those cases controvert the case of *Coe* v. *Errol, supra.* In fact, in the opinion in the latter case the Daniel Ball case is referred to and distinguished. The principle recognized in the Daniel Ball case and the subsequent cases, ending with *Railroad Co.* v. *Penna.*, 136 U. S., 114, is that instrumentality of commerce, not municipal or local in its nature, may become an instrumentality of interstate commerce by its business, although itself working entirely within the limits of one State. Justice Lamar in the last-mentioned case called attention to the fact that the railroad in that case was a link in a "through line." On the other hand the case of *Coe* v. *Errol* was dealing with merely local or municipal instruments of commerce, such as "carts or other vehicles, or even floating them to the depot." The case of *Coe* v. *Errol* was cited with approval in *Kidd* v. *Pearson,* 128 U. S., 1-24, and was also recognized as correct in *Lehigh Valley Rd.* v. *Penna.*, 145 U. S., 192. We also ask consideration of the last-mentioned case, as showing that the Supreme Court is not inclined to push the doctrine of interstate commerce beyond what necessity demands.

We submit that the complainant comes within the principle of *Coe* v. *Errol.* It is local and municipal in its nature. It does not, nor does it pretend to, partake of the nature of a long-distance telephone. It no more partakes of the nature of an instrument of interstate commerce than would a street car, whose owner had agreed with a through line of railroads to haul its passengers from one depot to another at a stipulated price. Neither the hackman who drives one to the depot, nor the driver of the wagon which carries one's trunk to the same place is engaged in interstate commerce. The street car, the hack, and the wagon would each in some remote way aid interstate commerce—but a court would not regard such incidental possibilities. It would hold that its true, its real business was local, and not affected by the interstate commerce clause of the Constitution.

Such we submit is the nature and business of the Richmond Exchange of the Southern Bell Telephone and Telegraph Company. The telephone lines are not a link between other lines running into the State on the one hand and running out of it on the other. They are a mere local vehicle to carry the messages to the office of the common carrier of messages, by whom alone it is "actually launched on its way to another State." Carrying them from the telephone subscriber or patron to the telegraph office "is only an interior movement of the property entirely within the State for the purpose, it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself." It was upon this point that Brawley, judge, dissented in the Circuit Court of Appeals, withholding his assent from " so much of the opinion as holds that a telephone company, such as is described in this case, and whose business is local in character, is within the purview of the act of Congress of July 14, 1866."

We submit that the company cannot be regarded as doing an interstate commerce business even as to the messages which it delivers to or receives from the Western Union Telegraph Company.

That being the fact, the company, as to its Richmond exchange, is not entirely to any protection from said act of Congress, even if its terms were broad enough to embrace telephone companies. It would be unconstitutional and void as to the Richmond exchange; for Congress can pass no law bearing upon any commerce, except "to regulate commerce with foreign nations, and among the several States and the Indian tribes." Any law which it passes so far as it bears upon a instrumentality of merely local or infra State commerce is void. Hence again we submit that the lower court erred in decreeing that the company was as to said Richmond exchange, "in accordance with the terms and provisions and under the protection of the act of Congress of the United States, approved July 24, 1866," entitled to have the injunction which was granted in the decree complained of.

Passing to those messages, which are admittedly infra State commerce—messages, most of which never leave the corporate limits of the

city, and none of which ever go beyond the limits of the State; is it not still more certain that the Circuit Court erred in entering said decree; "the Court intending by said injunction to enjoin the city from interfering with the *local* business and messages as well as those of an interstate character." It is hard to understand upon what principle the Circuit Court based its decree so far as it applies to what the Court itself recognized as "local business and messages." Yet the Court of Appeals affirmed that error. As was said in the case of the State Freight Tax, 15, Wal., 232-277, and quoted in *Fargo* v. *Michigan*, 121 U. S., 230-241. "Doubtless a State may regulate its internal commerce as it pleases."

In *Wabash Rly. Co.* v. *Illinois*, 118 U. S., 557, the same principle was more fully announced. Said the Court: "The charges for these might be within the competency of the Illinois Legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States or interstate commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the States. It has often been held in this Court, and there can be no doubt about it, that there is a commerce wholly within the State, which is not subject to the constitutional provision," &c. (See also *Dow* v. *Beidleman*, 125 U. S., 680; *Geo. Bank Co.* v. *Smith*, 128 U. S., 174-179.)

The Supreme Court of the United States has been called upon several times to recognize this power of a State even as to telegraph companies, claiming the same protection under the same act of Congress that the complainant company here claims. In *Telegraph Co.* v. *Texas*, 105 U. S., 460-66, it said:

"It follows that the judgment, so far as it includes the tax on messages sent out of the State, or for the government on public business, is erroneous. The rule that the regulation of commerce which is con-

fined exclusively within the jurisdiction and territory of a State, and does not affect other nations or States or the Indian tribes, that is to say, the purely internal commerce of a State belongs exclusively to the State, is as well settled as that the regulation of commerce which does affect other nations or States or the Indian tribes, belongs to Congress. Any tax, therefore, which the State may put on messagessent by private parties, and not by the agents of the government of the United States, from one place to another exclusively within its own jurisdiction will not be repugnant to the Constitution of the United States. Whether the law of Texas in its present form can be used to enforce the collection of such a tax is a question entirely within the jurisdiction of the courts of the State, and as to which we have no power of review." (See also *West. Un. Tel. Co.* v. *Pendleton*, 122 U. S., 247-257; *West. Un. Tel. Co.* v. *Massachusetts*, 125 U. S., 530-548; *West. Un. Tel. Co.* v. *Penna.*, 128 U. S., 39-40. Such being the law as to telegraph companies, which are mentioned by name in the act, why should it not be the law as to telephone companies also?

Again we submit that the Circuit Court erred in its decree when it declared that the complainant company was protected by said act of Congress even as to its "local business and messages," and that the Court of Appeals erred in affirming such a decree.

III.

We come next to the position of the complainant that the business and lines of the company "constitute a part of the postal service of the United States." It is claimed by the company that if it forms a part of that service, then it is protected from interference even as to local messages. No authority can be found in support of such a position. It cannot be tenable. If it were then no State would have any power to put restrictions or regulations upon any railroad within its borders, although not engaged in any way in interstate commerce. We know, however, from every respectable decision that States do possess such power. Yet a railroad actually carries the United

States mail. No case decided by the Supreme Court puts the constitutionality of the act upon the ground that the telegraph forms a part of the postal service. Every decision of that court construing said act of Congress finds the power of Congress to enact such a statute in the clause of the Constitution of the United States as to interstate commerce. In the quotation above made from the decision in *Telegraph Co.* v. *Texas, supra*, the court holds that while the company will be protected from State interference as to messages sent "by the agents of the government of the United States," yet it can put "any tax" it may choose "on messages sent by private parties, &c., from one place to another exclusively within its own jurisdiction."

That decision, and the several others affirming it, show that the fact that the officials of the Government of the United States use the company's lines on official business, only protects the company as to the messages sent by such officials. Such being the law as to telegraph companies, we can imagine no reason why the protection afforded telephone companies should not at least be as limited.

IV.

The next ground upon which we insist that the said decree is erroneous is that even if the entire business of the company would have been within the scope of said act, had its lines been established after it had accepted the terms of said act, and constructed under its protection, yet having been constructed and established under the contract contained in said ordinance of June 26, 1884, it cannot now refuse to comply with the terms of said contract. The company claims that it is released from all the obligations of said contract entered into on June 26, 1884, by reason of its acceptance of said act of Congress on February 13, 1889—a voluntarily delayed acceptance. In other words, it claims that having exercised its alleged option to enter upon and occupy the streets of said city, either under said act of Congress or under said contract ordinance of the city, and having selected to enter and having entered under the terms of said ordinance, it can,

when it sees fit, plead its subsequent acceptance of said act as a protection against and a nullification of the terms of said contract ordinance, voluntarily sought for and accepted by it.

Surely the complainant was not obliged to proceed under the power given by the said act, and force all necessary routes from the city of Richmond. It had ample power to enter into a contract with said city as to the use of its streets, and to use them under and subject to said contract. We cannot think that this can be disputed. If proof of it be needed, the complainant's bill and exhibits furnish it. The complainant entered upon the streets of said city in 1884 under the terms and conditions of the ordinance of June 26, 1884. Yet the complainant admits that it never accepted the terms of the act of Congress until February 13, 1889. No one will pretend that the act applied to the complainant until its acceptance of it was filed. Under what then was the complainant acting in the meantime? Only under the terms and conditions of the contract contained in said ordinance. What then was the effect of the acceptance of said act? Did it destroy the obligation of a contract? We admit, that in a proper case, "It is no answer to this to say that it interferes with the validity of contracts, for no provision of the Constitution prohibits Congress from doing this as it does the States," &c. (*Mitchell* v. *Clark*, 110 U. S., 633-643.) But we submit that no such intention should be *inferred* of Congress. That before such a construction should be put upon an act, the intention of Congress should be most manifest. At least judicially, Congress is not to be *presumed* to intend a wrong.

Can it be pretended that the act of Congress forbids and prohibits any telegraph company, after accepting it, from making with a city for the use of its streets any kind of contract which it might deem desirable? Such a pretention would make Congress a coddling nurse instead of a Governmental shield. The power given by the act is simply a permissive one, uncoupled with any limitations upon the company's former and corporate powers. But if it be admitted that Congress did not intend to prohibit such contracts, then surely it can-

not be earnestly claimed that Congress intended to destroy the obligation of such a contract entered into prior to the acceptance. It is far more probable that Congress would prohibit the making of such a contract, than that it would legalize a breach of it, after it had been made.

It is no argument against the contract, that, if the company had at first come in under the act of Congress, no provision would or could have been inserted as to a repeal. A party to a contract can voluntarily bind himself to terms more disadvantageous than the law would impose. The Supreme Court of the United States has decided that an instrumentality of interstate commerce may bind itself to a State which it enters, with obligations, which the principles of law, applicable to interstate commerce, would not allow a State to impose, after the instrumentality had entered the State.

"'The charter of the Baltimore and Ohio Railroad Company for constructing and working a branch railroad between Baltimore and Washington contained a stipulation that the company at the end of every six months should pay to the State one-fifth of the whole amount received for the transportation of passengers." The obligation was held binding. (*Railroad Company* v. *Maryland*, 21 Wal., 456.) In its opinion the Court said:

"What amounts to a regulation of commerce between the State, or to a discrimination against the citizens of other States? This is often difficult to determine. In view, however, of the very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises, and its corporations, we cannot regard the stipulations in question as amounting to either of these unconstitutional acts."

In *Ashley* v. *Ryan*, 153 U. S., p. 436, a similar question arose, where the court approved the case of *Railroad Co.* v. *Maryland*, and held that "a State, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation, organized under its laws, may impose such conditions as it deems proper, and the

acceptance of the franchise implies a submission to the conditions, without which the franchise could not have been obtained." The court says on p. 441:

"As it was within the discretion of the State to withhold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its power to impose whatever condition it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the State law, carried with it a voluntary assumption of any burden with which the privilege was accompanied and without which the right of corporate existence could not have been procured. We say voluntary assumption, because, as the claim to the franchise was voluntary, the assumption of the privilege which resulted from it partook necessarily of the nature of the claim for corporate existence. Having thus accepted the act of grace of the State and taken the advantages which sprang from it, the company cannot be permitted to hold on to the privilege or right granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought."

Could any language be more applicable to this case? In 1884 the company, not having attempted by an acceptance to bring itself within the benefits of the act of Congress, accepted the terms of the city ordinance. It said by its ordinance of 1884 you can come in on certain terms. The company accepted those terms. We submit that the Supreme Court spoke simply honest words when it said that a company should not be "permitted to hold on to the privilege or right granted, and at the same time repudiated the condition by the performance of which it could alone obtain the privilege which it sought."

Whatever right the company may have had to demand and obtain from the city a right of way over and along its streets under said act of Congress, and free of any contract with the city, is a question that is outside of this controversy, as no such demand has ever been made.

Certain it is, that the observance by the complainant of its contract will not prevent it from demanding a route under said act, if it comes within its scope. And we submit that it is equally certain that its right to demand a route under the said act, if it has any such right, cannot protect it from being made to abide by the terms of the contract-ordinance of June 26, 1884. A right to *some* route does not entitle it to any particular route—especially one which it receives on certain terms and which it agreed to surrender on certain terms. Hence the city should not be enjoined from requiring the complainant to perform the terms of said ordinance, and remove its poles and wires if the repeal ordinance of December 14, 1894, is sufficiently broad in its terms, and is valid. Nor has the city declared by its ordinances any desire to make the complainant remove its poles and wires from the streets, other than those in which conduits are required. It is true that the city repealed the ordinance of June 26, 1884. There was no other way by which the city could get free of the privileges granted to the complainant. There was no other way by which the city could make the complainant come under any general ordinance applicable to all telephone companies within the city's limits. But the city passed on September 10, 1895, an ordinance, a copy of which is filed with the bill as Exhibit "H," which would have protected the complainant as to its poles and wires, except in those streets in which conduits are required, had it seen fit to bring itself within the provisions of this last-mentioned ordinance. But it has refused to do so, because of its objection to the determination of the city to have in its streets as few poles for electrical purposes as possible, and to put light current wires of different companies together, as far as possible, on the same poles, and heavy current wires together on other poles. It cannot be denied that the effort of the city to limit, as far as possible, the number of poles encumbering its streets, is a reasonable and praiseworthy regulation of the use of the streets by electrical companies.

The above features of the city's conduct in this matter appear in

the exhibits filed with the bill, and show that the city was wise in contracting with the complainant for a repeal of the ordinance under which it has heretofore acted. We submit that the reservation of the power to repeal was within the power of the city to regulate the use of its streets, and even if it could not force a telephone company to accept a route under an ordinance containing such a reservation, yet having accepted a contract as to the use of the city's streets with such a provision in it, such a contract is valid and binding on the complainant.

V.

We come next to notice the effect of the repeal ordinance of June 26, 1884. The company raises two contentions as to that ordinance.

1st. That the city had no power under the State statute to attach to the ordinance any provision for its repeal.

2d. That if it had such power, yet the repeal does not affect the routes already granted, and only prevents the granting of any new ones.

The basis of the complainant's claim that the city had no power to reserve the right to repeal, is that the State reserved the right to repeal any privilege given by the statute, and because the said statute only authorized any city to consent to the occupation and use of its streets, and did not expressly give any authority to a city to attach any conditions to its consent.

It is impossible to see how the reservation on the part of the State could destroy any right of the city to reserve the right to repeal. The statute shows that it was the intention of the State that the cities should not be disturbed without their respective consents. If it had proposed to ignore the wishes of the cities, and to have at all times its will alone the arbiter, it would have said so, instead of authorizing so far as it could, the city to *absolutely refuse* to allow any telegraph or telephone company to occupy its streets. While it is true that the reservation on the part of the State applies to any

such company, both so far as it may be within or without a city, yet it was never intended to take away a right, which was embraced in the right expressly given, viz., to absolutely refuse such companies any right to use its streets. The power of a city, under a clause of that character to impose conditions, limitations and restrictions is no longer an open question. It has already been recognized and determined by a decision, first, of the Supreme Court of this State, and then, in the same case, by a decision of the Supreme Court of the United States. (See *Rich., Fred. & Po. R. R. Co.* v. *City of Richmond*, 26 Gratt., 83, and upon appeal, in 96 U. S., p. 521.)

It appears in that case, that the statute of Virginia, authorizing the building of the Richmond, Fredericksburg and Potomac railroad, directed that books of subscription might be opened "for the purpose of making a railroad from some point within the corporation of Richmond, *to be approved by the Common Council,*" &c., &c. Under that power the city of Richmond passed an ordinance approving a location asked for by the company, upon condition, "that the corporation of Richmond shall not be considered as hereby parting with any power or chartered privilege, not necessary to the said railroad company for constructing said railroad, and connecting the same with the depot of said company within the limits of the city."

The route of the road ran on Broad street from the western limit to about the centre of the city for about a mile, and on that route the company hauled its cars by steam for about forty years. Then the City Council passed an ordinance forbidding the propelling of cars *by steam* on the said route on Broad street. This last ordinance was upheld by both the Supreme Court of Virginia and the Supreme Court of the United States. In the opinion of the latter Court, it is said:

"The power to approve certainly implies the power to reject one location, &c., and this necessarily carries with it the further power to reserve such governmental control over the company in respect to the

road, when built," &c. * * "This the city was willing to do, upon condition that it should not be considered as thereby parting with any power or chartered privilege, not necessary to the company, for constructing its road or connecting it with the depot. The terms were proposed to the company and accepted. * * By the conditions imposed, these powers were all reserved, except to the extent of permitting the company to construct its roads upon the route designated, and connect it with the depot. All the usual and ordinary powers of the city goverment over the road when constructed, and over the company in respect to its use, were expressly retained. The company, therefore, occupied Broad street upon the same terms and conditions it would, if the charter had located the route of the road within the city, but in terms subjected the company to the government in respect to the use of the road when constructed."

We submit that the claim that the city had no power to reserve the right to repeal the ordinance of June 26, 1884, is without merit.

It now remains to see what is the effect and the extent of the repeal. The complainant contends that it had no effect upon the poles and wires already erected and in use, and, if of any effect, could only revoke the power given the Committee on Streets to grant any new or additional route. The city insists that its effect was to repeal the ordinance of June 26, 1884, *in toto*, and revoke absolutely every right and privilege obtained or exercised by the complainant thereunder.

The language of the section reserving the right of repeal is as follows:

"This ordinance may at any time be repealed by the Council of the city of Richmond; such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law." Such language admits of no doubt as to what was to be repealed. "This ordinance" —the creation and embodiment of the franchise in all its parts—the life of every privilege therein brought into being—was, what might "at any time be repealed." It did not provide for the repealing of some provision or part of the ordinance. It did not limit the repeal

to a revocation of the power given to the Committee on Streets. It declared that the ordinance in its entire scope and effect—*"this ordinance* may at any time be repealed." It embraced in such terms the declaration that every right and privilege, created by the ordinance, could be revoked and obliterated. Such rights and privileges could only exist by reason of the existence of said ordinance. When one ceased to exist, the others also expired.

The subsequent provision, that "such repeal to take effect twelve months" after the repeal ordinance became a law, clearly shows what was meant to be the effect of the repeal of the ordinance. It surely did not mean that after the passage of such repeal the Committee on Streets could continue for twelve months to grant new routes. Yet such is the effect of the construcion put by the complainant upon the terms reserving the right to repeal. If, as the complainant contends, the effect of a repeal was, merely to prevent the Committee on Streets from granting new routes, then, as the repeal was not to take effect for twelve months, the committee could continue from that time to grant new routes. And if such new routes were also to be beyond reach of the repeal, then the repeal would be virtually useless if the committee should see fit during those twelve months to be very liberal in its granting of new routes. Such a construction, although it is the one for which the complainant contends, is too strained and unreasonable for it to be accepted.

In *Greenwood* v. *Freight Co.*, 105 U. S.,13, it appears that the Legislature of Massachusetts had by statute created a street railroad company. At the time of the passage of that special statute there existed also a general statute, reserving the right to amend, alter or repeal, at the pleasure of the Legislature, every act of incorporation passed by it. The Legislature repealed the special statute, and the question arose, as to what was the effect of that repeal. The Supreme Court held:

"Such an act may be amended; that is, it may be changed by addi-

tions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it may be repealed? Is it the act of incorporation? Is it the organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be law; or the Legislature may adopt the milder course of amending the law, &c., &c. All this may be done at the pleasure of the Legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it," &c., &c.

And again on page 18 and 19 it says:

"One obvious effect of the repeal of the statute is that it no longer exists. Its life is at end. * * * If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights."

We submit that the above authority is conclusive, and that the repeal revokes any right to continue in use its poles and wires which the complainant may have erected and strung prior to such repeal.

VI.

But even if the complainant's business were interstate commerce, and the complainant were embraced in the terms of the said act of Congress, and the repeal ordinance were ineffective, yet the company would by no means be as free of municipal control as it claims to be in its bill of complaint, and declared in the decree complained of. The bill alleges that the company "under the act of Congress, &c., was and is entitled to maintain and operate its lines through and over the streets and alleys of the city of Richmond, without regard to the con-

sent of the said city," &c. (p. 5,) and later in its bill of complaint it alleges in substance that the value of its property is being injured by the passage and threatened enforcement of the two ordinances approved September 10, 1895; copies of which were filed with the bill as exhibits. The prayer of the bill asks "that the ordinances of said city of the 14th of December, 1894, and of the 10th of September, 1895, so far as they undertake to prevent your orator from maintaining and using its lines, poles and wires over and along the streets and alleys of the city of Richmond from repairing, renewing and extending its said poles, wires, lines and routes as its business may require may be declared null and void." The decree declares the right of the company "to put up, renew, replace and repair its lines, poles and wires" over and along the streets and alleys of the city of Richmond, both those now occupied by the complainant company and those not now so occupied, and enjoined the city "from preventing or interfering with the exercise of the aforesaid rights by the complainant company."

By the eleventh assignment of error the attention of the lower court was called to the fact that the said decree was erroneous "because it gives the complainant an unrestricted right to erect poles anywhere in said city without being subject to the ordinance of the city approved September 10, 1895, filed as Exhibit 'G' with the bill of complaint, or any of its provisions, or any other regulation which may be hereafter ordered by the city authorities." Although the attention of the lower court was called to that error, it remained unchanged, and the city's hands were tied even as to imposing any reasonable regulation. And yet there cannot be any doubt as to the right of the city in that respect. The Supreme Court of the United States has been called upon more than one occasion to say whether under said act telegraph companies were free from State and municipal control. In *West. Un. Tel. Co.* v. *Mass.*, 125 U. S., 530-548, it is held that:

"It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority

to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed *no obedience to the laws of the State* into which it thus entered, and was under no obligation to pay its fair proposition of the taxes necessary to its support."

In *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S., 92-100, the court said:

"It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise to be exercised in subordination to public as well as to private rights."

And on page — it says:

"If it is, as these held (*West. Un. Tel. Co.* v. *Mass.*, 125 U. S.,) simply a permissive statute, and nothing in it which implies that the permission to extend its lines along roads, not built or owned by the United States, carries with it any exemption from the ordinary burdens of taxation, it may *also* be affirmed that it carries with it no exemption *from the ordinary burdens* which may be cast upon those who would appropriate to their exclusive use any portion of the public highways."

This latter case came again before the court upon a petition for a rehearing, 149 U. S., 465. In its decision upon said petition, the court said:

"If the city gives a right to the use of the streets or public grounds, as it did by Ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used."

And on pages 471-472 it says:

"The determination of the amount to be paid for the use is as much a matter of regulation as determining the place which may be used, or the size or height of the poles. * * * But if the city had power to contract with defendant for the use of the streets, it was because it had control over that use. If it can sell the use for a con-

sideration, it can require payment of a consideration for the use; and when counsel say that no question can be made as to the validity of such a contract, do they not concede that the city had such control over the use of the streets as enables it to demand pay therefor?"

The above authorities clearly establish that the telegraph company, which occupies the streets of a city, is subject to all reasonable regulations which the municipality may impose.

It follows that if the said ordinances, filed as Exhibits "G" and "H," contain reasonable regulations, then the lower court should at least have modified its injunction to the extent of requiring the company to conform to such of said regulations as the lower court might deem it to be reasonable. It is within the province of a Court of Chancery in granting an injunction to impose conditions upon the complainant. Hence, if the Court had power to grant any injunction in this case, it should have only done so upon such conditions set forth in said two ordinances as are reasonable regulations. In looking to see which of the requirements are reasonable, they must be considered as to the time when the complainant refused to proceed or act under them. If the complainant, by his failure to conform, has allowed new circumstances to arise, which would make his compliance now with the said requirements considerably more burdensome, it is his own fault, and the reasonableness of the requirements is not lessened or affected. The complainant would have no one but himself to blame, and could not, because of his own wrong conduct, be relieved from performing acts reasonable when required.

It is true that the Circuit Court of Appeals held that the decision of the Circuit Court was erroneous in that it did not recognize the right of the city to impose reasonable regulations upon the company for its use of the streets. But the Circuit Court of Appeals only declared that general principles. It followed the Circuit Court in holding that the regulations set forth in the two ordinances of September 10, 1895, were beyond the power of the city. In that the city respectfully insists that the Court erred. Even were the requirements too onerous, yet

the Court should have pointed out to what extent, and not merely declare them void.

We submit that the terms of said ordinance are not unreasonable. It is easy to understand why the city in 1884 should have reserved the right to repeal the ordinance of June 26, 1884. That ordinance did not undertake to limit or specify the routes to be occupied by the complainant. It authorized the use of "such routes as may be specified and agreed on by a resolution or resolutions of the Committee on Streets from time to time," &c. Having delegated so broad a power it was but the duty of the Council to protect the city by reserving the power of repeal. In the light also of the fact that the invention was at that time comparatively new, with its inconveniences not fully known, it was well to provide for any contingency which might require its removal. Such a contingency has, in the opinion of the city of Richmond, arisen as to a great many of the poles and wires of the complainant. That is shown by the ordinance of the said city, filed with the complainant's bill as Exhibit "G," requiring the removal of poles and wires from overhead in certain streets, and for the construction and use of conduits in the same. The streets specified in the ordinance are the most crowded thoroughfares in that city. This latter ordinance does not declare any desire or intention to drive the complainant from the city. It puts the complainant on the footing with any other telephone company. The second section of this ordinance declares that "the City Council will grant permission to *any* company, corporation, partnership or individual to place its wires and electrical conductors in conduits under the surface of said streets of the city," &c., &c.

The right of a city to require the placing of wires in conduits was decided in favor of such municipal power by Wallace, J., in *West. Un. Tel. Co.* v. *Mayor of New York*, 3 Law Repts. Antd., page 449. We know of no test more liberal to the company as to how far the said requirements are unreasonable than the objections which the com-

pany itself thinks exists, and which it specifies in its bill. On page 8, it says:

"Under one of these ordinances your orator was required (under penalty of ruinous and unreasonable figures) to petition for the privilege of erecting and maintaining poles and wires where they now are, 'in accordance with the conditions of this ordinance and such other conditions as the Council may see fit to impose.' And the very first condition to which the company would have to consent, if it made the petition, was, if the company failed to obtain permission asked for, it was to remove its poles and wires from the streets and be liable to fines amounting to thousands of dollars for not doing so."

That is the full text of the indictment against said ordinance as drawn by the complainant in its bill. In the first place, we ask, what would the "consent," or more properly the promise of the company, be worth? If its promise made in the acceptance of the ordinance of June 26, 1884, before its acceptance of the said act of Congress, is not binding, but worthless, of what consideration would its promise, made after its acceptance of said act, be worth? Would it not be a case of "less than nothing?"

And we submit that its construction of the said ordinance is as unreliable as its "consent." The ordinance cannot be construed to mean that if the company failed to obtain the required consent it would be liable to any fine for maintaining and using its poles and wires pending the decision of the Council as to such petition. The ordinance gave the company from the 25th of September to the 20th day of December, 1895, to petition the Council, and then act on its refusal, if such should be the result. No fine was to be imposed unless the petition should be refused, and the poles and wires remain until "the 20th day of December, 1895." (P. 19.) Nor was any "consent" or promise required to be given. The company had the right to petition, and its petition could not take away, nor did it require any surrender of any right it might have under the ordinance of June 26th, 1884, nor under the act of Congress.

It may be contended, as was contended in the courts below, that section 7 of the same ordinance is unreasonable. That section reads:

"The City Council hereby reserves the right to put at any time other restrictions and regulations as to the erection and use of said poles, wires and other apparatus used in connection with the transmission of electricity, and from time to time require such poles as it may deem proper to be removed, and the wires thereon to be run in conduits upon such terms as the city may deem proper."

We have seen that the right to require wires to be run in conduits is regarded as a reasonable requirement. It is a requirement which is being enforced daily in the large cities of this country. Hence no objection can be sustained as to the specific reservation. Nor can any be sustained as to the more general reservation of power. In the first place a Court is not to *presume* that under such reservation the city will put any unreasonble requirements "as *to the erection and use* of said poles," &c. The reservation is confined to the "erection and use." It indicates that the city desired to reserve power to make such requirements as might be necessary for the safety and comfort of her citizens. Such would be the construction which a Court would put upon the language quoted. Nor would any Court hold that by reasons of those words the city could uselessly hamper or destroy said company's property or rights. Suppose that the city should pass some unjust and unreasonable requirement the company would not be obliged to accept it. If the city should attempt to enforce it, the company would undoubtedly have the right to come into the court below and obtain protection from it, if the company had any right to stand in that court in this litigation. If the lower court had any right to give the company protection from the repeal-ordinance of June 26, 1884, it would have the same right to say hereafter that the city should not enforce an unreasonable requirement. Hence the said seventh section does not afford any reasons why the company should not have recognized and

proceeded in accordance with the terms of the said ordinance as to the joint use of poles of September 10, 1895.

We therefore submit that even if the court were right in holding that the company was protected as to its Richmond exchange by the said act of Congress, yet it should also have held that the said ordinances, made a part of the bill as Exhibits "G" and "H," were binding on the company, and that the company must proceed in accordance with its terms.

We further submit that the complainant has not shown even a plausible reason for an injunction. It does not allege that the city is removing or interfering with, has removed or interferred with, or intends to remove or interfere with its poles and wires. It states only two grounds—

1st. "There have been for some time reports that its poles were to be cut down, and it fears, and has reason to fear, it submits, that such action by the city will be taken," &c.

2d. "That the city proposes to fine it for keeping up its poles and wires."

Neither ground can be regarded as justifying an injunction. Can the first ground justify an injunction against the city to any extent, even to forbidding the city from cutting down said poles and wires? Are mere rumors or street gossip sufficient to call for the issuance of a writ of injunction? Or is it true that "an injunction, being a harsh remedy, will not be granted in the first instance except upon a clear *prima facie* case, and upon *positive* averments of the equities on which the application for relief is based?" (1 High Injt'ns, section 24.) Is the court to believe such "reports," when the complainant is not willing to allege in its bill that it believes them? Here the complainant shows by its guarded language how little confidence it puts in such "reports." It is only willing to allege that it "has reason to fear." How strong its "reason" or its "fear" it carefully leaves undisclosed. "Thus, it is well established that the mere allegation of irreparable injury will not suffice to warrant an injunction, but the

facts must appear on which the allegation is predicted in order that the court may be satisfied as to the nature of the injury." (1 High Injt'ns, section 34.) "Nor do the mere apprehensions and fears of complainant, unsustained by facts establishing their probability, constitute a sufficient ground to warrant the interference of equity by injunction, since such fears may exist without any substantial reason." (*Ibid*, section 35.)

We are aware of no respectable authority which can be cited as justifying an injunction upon such an allegation, nor do we believe, that any can be cited which holds, that the fact, that the city proposes to fine the complainant for keeping up its poles and wires, will warrant such a writ.

"Nor will an action for an injunction be entertained to test the authority of the mayor of a city to arrest and fine complainants for carrying on a business in contravention of the city ordinances, and to test the legality of such ordinances, the proper remedy being by appeal from the judgments imposing the penalties prescribed by the ordinances." (2 High on Injt'ns, 3d Ed.,section 1244; 1 Spell. Ex. Relief, section 15.)

We submit:

1st. That the Richmond exchange does not come within the scope of said act of Congress.

2d. That its business is not in any respect or to any extent interstate commerce.

3d. That if the messages sent and received to and from the Western Union Telegraph Co. are of such a nature, yet all its other messages are merely local.

4th. That the ordinance of June 26, 1884, was in the nature of a contract, by the terms of which the company must abide regardless of the nature of its business.

5th. That the ordinance of December 14, 1894, repealed the ordinance of June 26, 1884.

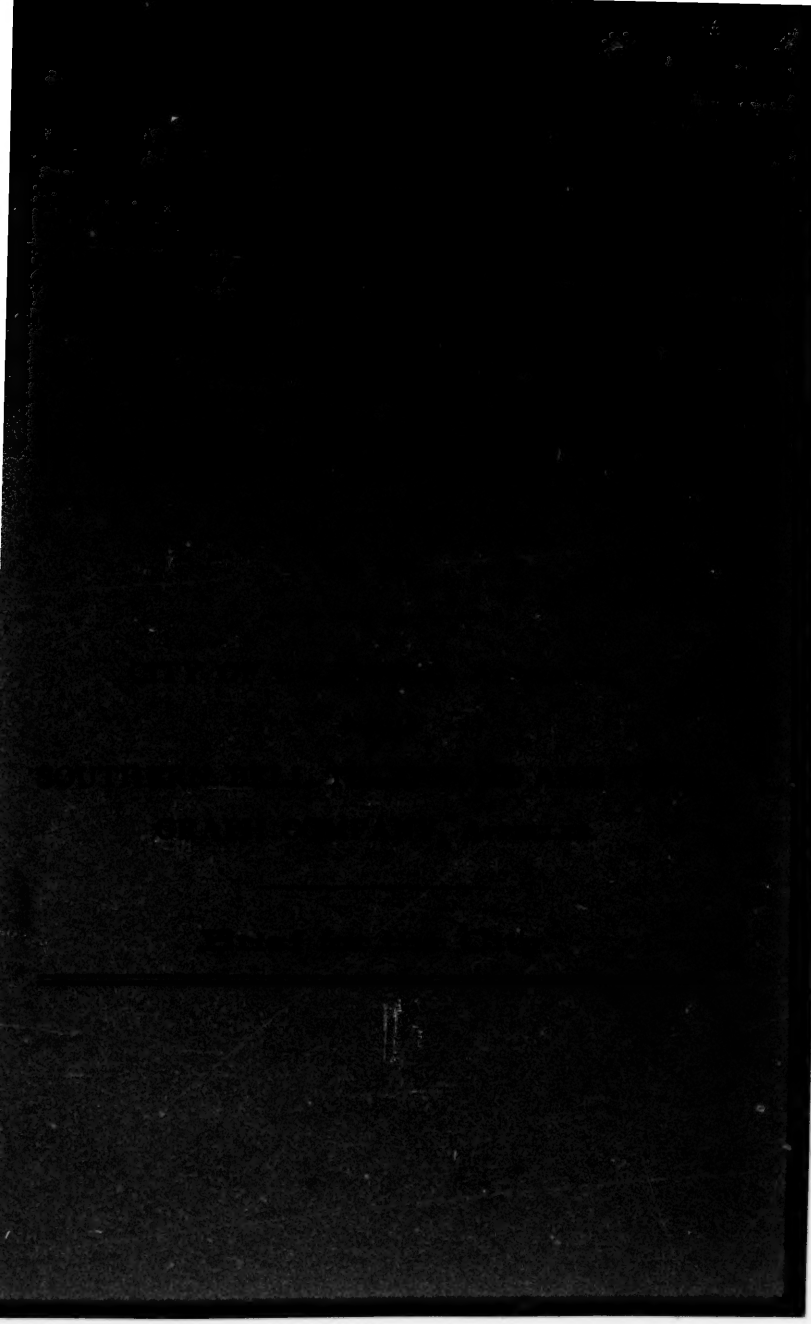
6th. That even if the city should be in error as to all of these

positions, yet that the ordinances of September 10, 1895, as to joint use of poles and as to conduits, do not contain any unreasonable provisions.

It is submitted that the said final decree of the Circuit Court is erroneous and should have been reversed, and that the injunction should have been dissolved and the bill dismissed, and that in refusing so to decide the Circuit Court of Appeals erred.

CITY OF RICHMOND,
By C. V. MEREDITH,
City Attorney.

March, 1898.



BRIEF FOR PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

No. 264.

CITY OF RICHMOND, APPELLANT,

versus

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, APPELLEE.

Brief for the City.

This cause is here by a writ of *certiorari* to the United States Circuit Court of Appeals for the Fourth Circuit. The decree complained of was rendered on February 5, 1898, by said court in the above-styled cause upon an appeal to said court from a decree of the Circuit Court of the United States for the Eastern District of Virginia, entered on the 23rd day of August, 1897, in a suit therein, brought by the Southern Bell Telephone and Telegraph Company *vs.* the City of Richmond.

By the said decree of the Circuit Court it was adjudged, that the said company had, under the authority of a certain act of Congress, approved July 24, 1866, "the right to construct, maintain, and operate its lines over and along the streets and alleys of the city of Richmond, both those now occupied by the complainant company, and those not

now so occupied, and to put up, renew, replace, and repair its lines, poles, and wires over and along said streets and alleys as well as to maintain, construct the same, and to connect its lines with new subscribers along said streets and alleys, and the said city of Richmond, its agents, officers, and all others are enjoined and restrained from cutting, removing, or in any way injuring the said lines, poles, and wires of the complainant company, and from preventing or interfering with the exercises of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising said rights." (See Record, page 75.)

By the decision of said Circuit Court of Appeals, that decree was reversed, and the cause remanded to the said Circuit Court with directions "to modify the terms of the injunction" granted by it, so as to conform to the opinion rendered by said Circuit Court of Appeals. The result of that decision was to affirm the decision of the said Circuit Court to the extent of holding that the said city was prevented by the said act of Congress from requiring the said company to move its poles and wires from the streets of said city, unless it would conform to two certain ordinances of the city, and that the city was also prevented by the same act from interfering with said company in extending its lines anywhere it might choose over any of the streets of said city. The said two ordinances having been held void, because they were deemed to interfere with rights granted by said act, the modification consisted in holding, that the injunction against the city was too broad, in that it did not announce in some general terms, that the poles and wires were subject to such regulations and restrictions as were then or might thereafter be imposed by said city in the lawful exercise of its police powers. The effect of the decision of the Circuit Court of Appeals was against the city, in that it declared that the company had rights, which the city denied, and that the city did not have the powers which she claimed to possess in the control of her highways. It is

because of that decision that the city has prayed that this cause and the legal principles involved may be reviewed by this court.

ACT OF CONGRESS.

The Act of Congress referred to is contained in U. S. Rev'd Statutes, § 5263, and is here quoted in full. As section 5268 is a part of the same act, and throws light upon one of the questions involved in this case, it is also quoted:

Section 5263. "Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States, but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

Section 5268. "Before any telegraph company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by law."

STATEMENT OF CASE.

On the 11th day of December, 1879, the appellee was chartered as a telegraph company. At that time there was in existence a telephone company known as the National Bell Telephone Company, and which had, on the 10th day of November, 1879, entered into a certain contract with the Western Union Telegraph Company, acting for itself and certain other companies. Such portions of said contract as are supposed by the appellee to throw light upon the sub-

ject of this litigation are set forth in the record of this case upon pages 50 and 55. By Article I., section 1, of that contract the National Bell Telephone Company contracted to pay a certain royalty to the Western Union Telegraph Company upon all telephones used in the United States under license of the National Bell Telephone Company. By section 1, article 2, the word telephone is defined as "an instrument for electrically transmitting or receiving articulate speech." By article 6 the Western Union Telegraph Company agreed to withdraw from the manufacture, rental, and use of telephones. By article 7 the Western Union Telegraph Company agreed to allow the National Bell Company to use any of its poles, fixtures, &c., upon reasonable terms. By section 2, article 12, a telephone "exchange" is defined. By section 1, article 13, telephone exchanges may be connected, provided they are not used for the transmission of general business messages, &c., in competition with the business of the Western Union Telegraph Company. In article 14 it is agreed that the National Bell shall furnish the Western Union with telephones for use in connection with telephone lines of said telephone company. In article 15 it is provided for the delivery of messages received from telephone lines and to be delivered over the telephone lines, or received over telephone lines and to be delivered over telegraph lines; and provides for a telephone connection between the office of the telegraph company and the office of the telephone exchange. By article 17 it is provided that the contract was to go into effect on the 1st of November, 1879, and to remain in force until the expiration of seventeen years thereafter; and further shows that the Richmond exchange was not embraced within the scope of the contract; that city being embraced in the terms of a contract between said Western Union Telegraph Company and said National Bell Telephone Company with James M. Ormes, dated August 26, 1879.

Subsequently the National Bell Telephone Company was merged into the American Bell Telephone Company,

and the Ormes contract afterwards became the property of the Southern Bell Telephone and Telegraph Company. (See record, p. 62.) On September 1, 1888, the Southern Bell Telephone and Telegraph Company surrendered to the American Bell Telephone Company its privileges under the Ormes contract. (See record, p. 62.) And on the same day entered into a contract with the American Bell Company for the use of its telephones upon certain terms and conditions. (See pp. 56 to 62, record.)

By the surrender of the Ormes contract the Richmond exchange came within the scope of the above-mentioned contract of November 1, 1879. Several years previous to such surrender, the Ormes contract, so far as it pertained to the city of Richmond, became the property of the Southern Bell Telephone and Telegraph Company. For in 1884 that company applied to the city of Richmond for permission to erect poles in and run wires along the streets and alleys of the said city for telephonic purposes.

On June 26, 1884, the city of Richmond granted such permission under the provisions of an ordinance, a copy of which is filed with the complainant's bill as Exhibit K., page 26. By section 1 of that ordinance the company was authorized to erect such poles and run such wires on the streets of said city on such routes as the Committee on Streets may from time to time designate "upon the conditions and under the provisions of this ordinance." Section 2 required that it should carry certain wires of the city fire alarm and police telegraph. Section 3 required that it should furnish telephonic service to the city at a special reduction of $10 per annum for each municipal station. Section 4 forbid it from injuring shade trees. Section 5 read as follows: "The ordinance may at any time be repealed by the Council of the city of Richmond; such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law." It was under the provisions of this ordinance that the Richmond telephone exchange or plant was established by the complainant. No poles were erected or wires

run by said company, except under the said ordinance. (See answer, page 36, record.)

On the 13th of February, 1889, nearly five years after it had accepted and worked under said ordinance, the said company filed its acceptance with the Postmaster-General of the above-mentioned act of Congress of July 24, 1866.

On the 18th day of July, 1891, the City Council passed an ordinance as to the joint use of poles erected in the city of Richmond for the support of wires used in connection with the transmission of electricity. Its general object was the diminution or the prevention of increase of poles for carrying wires for electrical purposes. That purpose was to be accomplished by requiring, so far as possible, the several companies running wires for different electrical purposes to hold and use the necessary poles jointly, instead of each company having its own poles, and thereby greatly encumbering the streets of the city of Richmond. The complainant company strenuously objected to said ordinance and refused to accept it. (See bill of complainant, page 6.) Such refusal was one of the reasons that caused the City Council afterwards to repeal the said ordinance of June 26, 1884, granting, as above stated, the privileges to the complainant company. (Page 37.)

Subsequently, in 1894, there was some correspondence between the City Engineer, speaking for a committee of the City Council known as the Committee on Grounds and Buildings, and Mr. McCluer, Superintendent of the Southern Bell Telephone and Telegraph Company, at Richmond office, in regard to the desire on the part of said committee that the complainant company should furnish free telephone service to the offices of several of the city officials. The complainant company, through Mr. McCluer, declined to furnish such free service. (See pp. 13 to 16.)

For several years previous to 1894, the Southern Bell Telephone and Telegraph Company has had its office connected with the office of the Western Union Telegraph Company by telephone wires, and there connected with three sets

of telephones received from the American Bell Telephone Company, and used for receiving from and delivering to subscribers of the Southern Bell Telephone and Telegraph Company messages which were sent to and received from points in and without the State of Virginia and in foreign countries over the wires of the Western Union Telegraph Company. The method of use was as follows: A subscriber of the Southern Bell Telephone and Telegraph Company, desiring to send a telegram over the Western Union lines, calls for a connection with the Western Union office. "The clerk of the Western Union Telegraph Company at the 'phone in its office receives the message through the 'phone, puts it in writing and hands it to the operator of the Western Union Telegraph Company, who transmits it over the wires of the latter company to its destination. When a telegram is received from a point outside of Richmond over the wires of the Western Union Telegraph Company to be sent to a subscriber of the Southern Bell Telephone and Telegraph Company, the Western Union operator, who receives the message, puts it in writing and hands it to the 'phone clerk of the latter company, who has charge of one of the 'phones in its office in Richmond, who calls up the person to whom the message is directed over the 'phone and delivers it to him through the 'phone." (Page 70.) This system of assisting each other was in use when the bill in this case was filed.

In December, 1894, the City Council of Richmond referred to its Committee on Streets for its consideration and subsequent report a draft of an ordinance of a general nature as to underground conduits (See page 73, record.)

No more effect could be given to such a general ordinance as to conduits than could be given to the ordinance as to the joint use of poles, as long as the Southern Bell Telephone Company franchise was in force; so at the same meeting the Council repealed the said ordinance of June 26, 1884. (See p. 18, record.) This repeal ordinance was approved December 14, 1894, and declared that "in accordance with the fifth section of said ordinance of June 26, 1884, all privi-

leges and rights granted by said ordinance shall cease and be determined at the expiration of twelve months from the approval of this ordinance by the Mayor." On the 17th of that month the said Committee on Streets requested the telephone and telegraph representatives to appear before it and discuss the question of a general conduit ordinance. Later in the same month the superintendent of the Western Union Telegraph Company in said city appeared and discussed the matter, which was referred to the City Attorney and City Engineer for their suggestions. On the 28th day of February, 1895, the same city officials were instructed by said committee to prepare and submit "a general ordinance as to telephone conduits." (See p. 73.) That instruction resulted in the preparation and adoption by the City Council of the two ordinances filed with the complainant's bill as Exhibits "G" and "H" respectively. Both of these ordinances were approved September 10, 1895.

The ordinance filed as Exhibit "G" prescribed that no pole now erected in the city for the support of wires should remain on any street after a certain date, unless the owner or user should first petition for and obtain the privilege of erecting poles and wires for telephonic purposes in accordance with the conditions of that ordinance. It required that all such poles should be used jointly under joint expense by the several companies running wires for electrical purposes, requiring heavy current wires to be placed on one set of poles and light current wires to be placed upon another set. It subjected the poles and their erection to the supervision of the City Engineer. It required such poles to carry the wires of the Fire-Alarm and Police Telegraph Department. It required an annual statement from the owner or user of such poles of their number and locations. It required an annual fee of $2.00 to be paid to the city authorities for every such pole. It contained certain provisions for the purpose of showing that said poles were kept in safe condition, and that the wires were properly fastened and properly insulated, so as to prevent the causing of a fire

by the escape of electricity. The Council also reserved the right to put other restrictions and regulations as to the erection of poles and wires, and to require such poles, as it might from time to time deem proper, to be removed and the wires to be run underground. (See pp. 16 to 22, record.)

The said ordinance, filed as Exhibit "H," specified certain streets in the busier and more crowded parts of the city, in which no poles should remain after a specified date; but required that in this portion all wires for the transmission of electricity, except trolley wires, should be run in underground conduits. In order that the city's streets might not be torn up too frequently, to the great inconvenience of its citizens, the ordinance required that any conduit built under its provisions should be built of a sufficient capacity to carry not only the wires then in said streets and alleys, but to provide for the increase thereof to at least 100 per cent., or double the capacity required for present needs, and that the wires of the city should be carried free; and that other companies should be allowed, when they should have obtained the consent of the City Council thereto, to use said conduits upon reasonable compensation to be determined by arbitration. It required certain compensation to be paid to the city for the use of its streets in this manner. It contained minor details specifying that the construction of the conduits and the placing of the wires therein should be subject to the supervision of the proper city officials. (See pages 23 to 26.)

The complainant company refused to accept or operate under either of said ordinances. And instead of recognizing as binding upon it the said repeal ordinance of December 14, 1894, by removing its poles and wires, it went on the 6th day of October, 1896, into the Circuit Court of the United States for the Eastern District of Virginia and filed its bill of complaint in this suit.

PLEADINGS.

Acting under the prayer of the said bill for an injunction restraining the city from interfering with its poles and wires in said streets and alleys, or with the erection of new poles and wires, or with the operation of its business, the Court granted a preliminary order restraining the city of Richmond from "injuring or in any way interfering with the poles, wires, instruments, or business of the plaintiff in said suit along and over the routes in said city now used by it; from interfering in any way with the proper use, maintenance, or repair of said poles, wires, and instruments of said plaintiff; and from taking proceedings to impose fines and penalties on said plaintiff for using, maintaining, or keeping in repair its said poles, wires, and implements until the further order of the Court; but leave is given the defendant upon ten days' notice to move to vacate this restraining order."

The complainant's bill alleges the incorporation of the company under the laws of New York and its residence in said State, and the existence of the city of Richmond as a municipal corporation under the laws of the State of Virginia. It alleges that the company was duly organized, and that it has been engaged for about fifteen years in constructing, maintaining, and operating telephone lines in Virginia and several other States; and during that time it has continually maintained exchanges at various places in said States and the said city of Richmond; that it has maintained during that time the poles and wires and necessary instruments and apparatus for telephonic communication, and has erected and maintained, in conducting said business, numerous poles and wires in and along certain streets and alleys in the city of Richmond, and it has erected and maintained said lines, wires, and poles under authority of the Council of the city of Richmond, Legislature of the State of Virginia, and acts of Congress of the United States. That, in the conduct of its business, it has maintained in the city of Richmond an

office or telephone exchange connected by wires with a large number of subscribers, and with the office of the Western Union Telegraph Company in said city; that many of said subscribers are connected through said exchange with the office of the Western Union Telegraph Company, and many of said subscribers do transmit and receive through their instruments on said premises, through said exchange to and from the office of the Western Union Telegraph Company, messages addressed and intended to be sent and received, and which are sent to and received from points in other States, in the District of Columbia, and foreign countries; your said orator having for years received and transmitted such messages in this manner under agreement still in force; and it also has subscribers outside of the city of Richmond, whose 'phones connect with the other 'phones of your orator in said city, by any through the means of wires and poles of your orator located on and along the streets and alleys of said city, many of which customers have no ready and convenient access to said Telegraph Company except through the use of your orator's wires and poles for the transmission and receipt of telegrams between them and points outside the State of Virginia, and use said 'phones, wires, and poles of your orator in connection with said Western Union Telegraph Company, for that purpose, under and by virtue of an agreement between your orator and said Western Union Telegraph Company for the joint use of the poles and fixtures for said companies in sending and receiving such messages; and that part of such transmission from the office of your orator's subscribers to and from the office of the Western Union Telegraph Company, of messages addressed and sent by telegraph to and from points outside of the State of Virginia, to the District of Columbia, and to foreign countries, is interstate commerce, and is commerce between said points outside of the city of Richmond and the city of Richmond and other States and the District of Columbia and foreign countries, and is a necessary part of the business of your orator, and that its said wires in the city of Richmond,

and its poles, to which they are attached, are used for that purpose."

The bill also alleges that it is the intention of the company to extend its business and lines across and beyond the city of Richmond, and State of Virginia, and into other countries and States. It alleges that its wires, poles, and lines in said streets and alleys of the city of Richmond constitute a part of the postal service of the United States; that every day it has to connect many of its subscribers with the office of the Western Union Telegraph Company for purposes of communication by means of the lines of said telegraph company between said subscribers in Richmond and their correspondents in other States. It alleges that its continuance as a telephone exchange is an essential and necessary part of the business of its subscribers; that its business and status is that of a telegraph company under the laws of the United States. It alleges its filing its acceptance of said act of Congress of July 24, 1866; and that by virtue of said acceptance it is entitled to operate lines of telephones over and along the post roads of the United States, and that the streets, alleys, and highways of the city of Richmond are among such post roads. It further alleges that the several departments of the United States located in Richmond used the lines and wires of said company for transmission by telephone of instructions, orders, and information in the administration of governmental affairs. It alleges that, in addition to its rights under said act of Congress, it was duly authorized to construct and maintain said telephone lines under section 1287 of the Code of Virginia (1887) along and over the streets and alleys of any city in said State, with the consent of the Council thereof. That, relying on its rights, it erected poles and wires in said streets and alleys and conducted its business therein and executed many contracts to furnish telephonic facilities to residents of Richmond, persons outside of said city, and to the officers and agents of the Federal Government. It alleges that under the said act of Congress it is entitled to maintain and operate its lines with-

out regard to the consent of said city, and did, in fact, locate many poles and wires and began operation of its business without such consent. It alleges that the city did, on the 26th day of June, 1884, after it had begun to operate its business in pursuance of section 1287 of the Code of Virginia, pass the ordinance giving its permission to erect poles and run suitable wires upon the streets of said city, and states further, in substance, the terms of said ordinance and filed with the bill a copy of said ordinance as Exhibit "K"; that, after the passage of said ordinance and in pursuance of the terms thereof and relying thereon as well as on the rights granted by the laws of the United States and State of Virginia, hereinbefore referred to, and before the attempted repeal of said ordinance, it erected poles and wires and operated telephone lines along and over the said streets of the city of Richmond. It alleges that while it was so conducting its business the city of Richmond, through its officials, began to make demands not only outside of its agreement with said city, but which were injurious to the company's business. It then alleges the passage of the ordinance of July 18, 1891, requiring the joint use of poles. It alleges that threats were made by some of those in authority in said city that, unless the company submitted to the requirements of the last-named ordinance, it would be driven from the city. It alleges that early in the year 1894 a demand was made upon the company for a number of free 'phones for the use of the city officials. It filed with its bill the correspondence about free 'phones between the City Engineer and Mr. McCluer, which has already been alluded to. It alleges that many threats were made of driving the company from the city, if the demands for free 'phones were not granted. It alleges the passage of an ordinance of December 14, 1894, repealing the ordinance of June 26, 1884, and files a copy as Exhibit "F." It alleges the passage of the two ordinances approved September 10, 1895, above mentioned, and files copies of the same as Exhibits "G" and "H." It alleges that the power to repeal an ordinance

does not contain the power to compel the removal of the poles and wires.

It alleges that the repeal ordinance cannot be construed to mean that such removal shall take place, and alleges that the reserved power of repeal and the repeal ordinance itself was only intended to prevent the granting of new routes by the Committee on Streets. It also insisted that the fifth section of said ordinance of June 26, 1884, reserving the right of repeal was *null and void* upon the ground that the City Council had no power to repeal, and that such power lay entirely in the Legislature of Virginia under section 1290 of the Code of Virginia. It further insisted that, having accepted the provisions of the act of Congress, it was entitled to the rights given by said act independent of, and superior to, that of the city of Richmond. It insists that telephone companies are embraced in the terms of said act of Congress. It then alleges that the city had granted a new telephone company, a rival of the complainant, the right to erect poles and wires along many of the same streets and routes which the complainant then occupied, and to put many of its poles along side the poles of the complainant. It alleges that the city claims the right not only to prevent the company from erecting new poles and wires and extending its lines, but to make it remove its then existing poles and wires. That the officers of the city alleged that the complainant had no right to occupy said streets and alleys of the city. That the ordinances before mentioned are a constant menace to its rights and privileges and intended to deter persons from making contracts with it. That its contract rights, franchise, and property will be destroyed, unless afforded protection asked for in the bill, and to that end prays that the city may be restrained and enjoined from "removing or interfering with its poles and wires in said city, and from interfering with the right of your orator to use said poles and wires, and that all proceedings by said city or its agents and others to prevent your orator from continuing, renewing, repairing, and extending its lines, wires, and poles in, along, and over the

streets and alleys of the said city, and to inflict fines and penalties on your orator for so doing, may be restrained and enjoined; that the right of your orator to use said poles and wires and to carry on its said business along and over the streets of the said city be declared and defined; that the ordinances of said city of the 14th of December, 1894, and of the 10th of September, 1895, so far as they undertake to prevent your orator from maintaining and using its lines, poles, and wires over and along the streets and alleys of the city of Richmond from repairing, renewing, and extending its said poles, wires, lines, and routes as its business may require may be declared *null and void*."

With the bill were filed the exhibits which have already been referred to.

On the 16th day of November, 1896, the city filed its demurrer to the bill, and for causes of demurrer alleged: That the bill was insufficient. That the act of Congress of July 24, 1866, does not apply to the complainant, but only to telegraph companies. That the said act, even if it applied to the complainant, does not give it any right to run its lines along the streets of the city without its consent and subject to reasonable regulations both as to occupancy of the streets and compensation for such use. That, if the act of Congress put the complainant as free of control of the city as it claimed in said bill, it is unconstitutional and void. That the manner of determining as to the routes of the poles and wires of the complainant and the compensation to be paid to the city was agreed upon in said ordinance of June 26, 1884, upon condition that the city should reserve the right to repeal said ordinance and require the complainant to remove its poles and wires as provided in said ordinance. That the said ordinance of July 26, 1884, was an agreement between the city of Richmond and said company, and the city in passing said repeal ordinance of December 14, 1894, was merely exercising the right reserved in said agreement. That under the Statute of Virginia referred to in said bill, respondent was given authority to reserve such power of revoca-

tion. That the power of such revocation had been properly exercised in said ordinance of December 14, 1894.

By consent, the hearing on said demurrer and restraining order was postponed until January 14, 1897, on which day the cause came on to be heard on said demurrer. Upon the argument of the demurrer the constitutionality of the act was admitted by the city. (See page 32.)

On January 24, 1897, the court filed an opinion overruling the demurrer. (See pp. 35 to 40.) And on March 15, 1897, entered an order, in accordance with said opinion overruling said demurrer, continuing the injunction until the further order of the court, and gave leave to the city to file its answer.

On March 30, 1897, the city filed its answer.

The city admitted that since 1884 the complainant had been maintaining and operating a telephone exchange, and had erected its poles and run its wires along the streets of said city; but denied that it had carried on said business, or used said streets for such purposes under any authority, except that of the City Council of Richmond and the Legislature of Virginia. The city called for proof of the alleged agreement between the complainant and the Western Union Telegraph Company. It denied that the sending of any messages over the wires of the complainant to be transmitted subsequently over the wires of said telegraph company to points outside of the State of Virginia was interstate commerce; or that such was a necessary part of the business of the complainant. It denied that the said wires, poles, and lines of the complainant constituted a part of the postal service of the United States, or that the business of the complainant was essential to the business of its subscribers for communication outside of Virginia. It denied that the business and status of the complainant, so far as it concerned its Richmond exchange and its poles and wires on the streets of said city was a telegraph company. It alleged that, while the complainant may have been chartered as a telegraph company, yet that, so far as its Richmond exchange was

concerned, it did no business as a telegraph company. It denied that the complainant was entitled to the protection given by the provisions of said act of Congress of July 24, 1866. It insisted that the departments of the United States Government, located in Richmond, only used said telephone exchange as any other subscriber did. It denied, and called for proof, that the complainant ever erected any poles or wires in said streets and alleys before applying to said city for permission so to do. It admitted the passage of the ordinance of June 18, 1891, as to the joint use of poles; and alleged the same reasons which have been heretofore stated for its passage. It denied knowledge of any threats having been made that the business of the complainant would be ruined, and asserted that no such threats were authorized by the city. It admits the passage of the repeal ordinance of December 14, 1894. It alleged that the Council intended, before the lapse of the twelve months required to make the repeal ordinance effective, to pass a general ordinance relating to telephone poles and wires; and did pass two such ordinances, approved September 10, 1895, copies of which are filed as exhibits with the bill. It denies that, if the complainant filed a petition for the continuance of its poles, it would have to agree to remove them should it fail to obtain such permission. It denies the construction put upon its reserved power to repeal, and the effect of said repeal ordinance. It denies that the acceptance of said act of Congress rendered the complainant independent of the control of the city of Richmond as to the poles and wires erected under the ordinance of June 26, 1884, and insisted that, having entered under the contract contained in the last mentioned ordinance, it was bound to obey in law the terms of that contract. It denies that telephone companies were intended to be embraced in the scope of said act of Congress. It admits that it has allowed the Richmond Standard Telephone Company to erect its poles and wires on certain streets and alleys of the city of Richmond; the latter company having accepted the terms of said ordinances approved

September 10, 1895, which are in this cause so vigorously denounced. It asserts that had the complainant company accepted the terms of said ordinances, then the Standard Company, had it entered at a later date, would have been obliged to have placed its wires, as far as practicable, on the poles of the complainant company; and insists that the complainant company having refused to accept said terms, and the Richmond Standard Company having erected its poles in pursuance of said terms, the complainant company must, when it run its wires under any authority, place them upon the poles of the Richmond Standard Company in accordance with the terms of the ordinance of September 10, 1895, as to the joint use of poles. It alleges that it had expressed no intention of giving any order to any of its officers to cut down the poles of the complainant company, and had done nothing to justify such fear.

The ordinance of September 10, 1895, filed as Exhibit "H" with the bill of complaint, provides a method for testing when a telephone pole is unlawfully in the street. That method is to summon the offender before one of its courts of lawful jurisdiction, and there have the right determined.

At May rules, 1897, the complainant company filed its replication. The evidence was then taken by both sides; but was taken by way of consent, as will be seen in the statement of the evidence on pages 42 to 73; and a statement of agreed facts from pages 73 to 75. The evidence so introduced and the facts agreed have been already sufficiently stated in the statement of the case as not to need repetition.

On the 23d of August, 1897, the Circuit Court entered the decree above complained of. On the 28th day of August, 1897, the city moved the Court to modify its decree "in this cause of August 23, 1897, by inserting therein after the words 'construct and operate the same,' the following words, to-wit: 'So far as to receive from and deliver to the Western Union Telegraph Company messages sent from beyond the limits of the State of Virginia, or to be sent be-

yond the said limits,' and by inserting therein after the words 'interfering with the exercise of the aforesaid rights by the complainant company,' the following words, to-wit: 'So far as the reception from and delivery to the Western Union Telegraph Company of any message sent from beyond the limits of the State of Virginia, or to be sent beyond said limits,' but the counsel for the complainant objected, and the Court, intending by said injunction to enjoin the city from interfering with the local business and messages, as well as those of an interstate character, doth decline and refuse to so modify said decree." (See page 76.)

Your petitioner duly filed its petition of appeal from said decree of August 23d, and stated the following assignment of errors:

ASSIGNMENT OF ERRORS.

1st. The Court erred in entering said temporary restraining order.

2d and 3d. That the Court erred in not sustaining the city's demurrer, and in overruling the same, and in entering the decree of March 15, 1897.

4th. That the Court erred in the said decree of August 23d in failing to pass upon the effect had upon the alleged rights of the complainant by the said statute of Virginia and the said city ordinance of June 26, 1884.

5th. That there is error in said decree because a telephone company is not a telegraph company under said act of Congress.

6th. Because if said act of Congress does embrace telephone companies, it only embraces such as do an interstate business and only to the extent of its interstate business; while the complainant only does a local business.

7th. Because, even if the complainant does an interstate business it also does a purely local business, and yet the Court in its decree refuses to recognize such a distinction, and enjoins the city from interfering with the business of

the company, even as to messages sent from one point in the State to another, or even from one point in the city to some other point therein.

8th. Because there was never any contract between the complainant company and the Western Union Telegraph Company which made the telephone business of the complainant company, or any part of it, interstate commerce.

9th. Because if there ever was any such contract it terminated on the 1st day of November, 1896.

10th. That even if there now existed any such contract which made any of the messages be of the nature of interstate commerce, yet the city should not have been enjoined from interfering with the business of the company as to messages sent from one point of the State to another, or from a point in said city to some other point therein.

11th. Because the decree gives the complainant the unrestricted right to erect poles anywhere in said city without being subject to the said ordinance of September 10, 1895, filed as Exhibit " G " with the bill of complainant, or in any of its provisions.

Upon the argument of said appeal before the Circuit Court of Appeals, the city admitted the constitutionality of the act of Congress. (See page 87.) On February, 1898, the said appeal was decided. In the opinion of the majority of the last-named court, being Judges Simonton and Purnell, all of said assignments of errors, except the eleventh, was in substance overruled, though not specifically. The eleventh assignment was only held good in part. As to it, the Court said as follows: (See pages 90 to 91.)

" This being so, the injunction granted by the Circuit Court is too broad in its language and effect. There should have been the recognition of a proper exercise of the police power by the municipal corporation, and the use by the complainant of its poles and lines should have been declared to be subject to such regulations and restrictions as may

now or may be hereafter imposed by the City Council of Richmond, in the proper and lawful exercise of the police power.

"The only remaining question is, do the ordinances of the city of Richmond prescribe regulations which will make the use burdensome and intolerable and practicably impossible?

"It belongs to the Legislature to exercise the police power of the State, subject to the power of the courts to adjudge whether any particular law is an invasion to rights secured by the Constitution. *(Mugler* vs. *Kansas,* 123 U. S. 623.) The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business of, or impose any unnecessarily restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts. *(Lawton* vs. *Steele,* 152 U. S. 137.). If this be the case with regard to the Legislature, *a fortiori,* it applies to a municipal corporation, the creature of the Legislature.

"On examination of these ordinances it will be seen that as a condition precedent to the use of the streets of Richmond, a petition must first be filed for the purpose of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of that ordinance, and such other conditions as the Council may see fit to impose. (Ordinance approved 10th September, 1895.) The seventh section of this ordinance expressly reserves to the City Council the right to put at any time other restrictions and regulations. And the whole tenor and effect of the ordinance is to put the company absolutely under the control of the city. And the terms of the ordinance are enforcible under heavy penalties. The next ordinance, the one providing for wires in conduits, after providing that the City Council may compel the removal of wires from poles overhead in certain streets, and the putting them in conduits in certain streets, under a penalty of not less than $100 or

more than $500 for each pole per week, provision is made for permission to build conduits of sufficient capacity to accommodate the wires in such streets, and to provide for an increase thereof to at least the extent of 100 per cent., the increase of space not to be occupied by the party building the conduits without the consent of the Council, the conduit to be used for the wires of the Council free, and the City Council to allow any other person or corporation to use such conduit for wires upon paying compensation in the mode prescribed by the City Council. This privilege of building and owning conduits to last no longer than fifteen years, at the end of which time the city may put other restrictions, conditions, and charges as it may see fit, or may order their removal at the expense of the owner. The charge for using or owning any wire in any such conduit shall be for each year until January 1, 1900, $2 per wire per mile. After January 1, 1900, such larger commission for the rest of the term as the City Council may see fit. These are some of the conditions now imposed with the right to impose any others which Council may see fit. Now it goes without saying that if the complainant, notwithstanding its claim of protection under the act of Congress of 1866, were willing to file a petition to the City Council for the privilege of using its streets and alleys, and in that petition agreed, in consideration of its grant, to abide by any present or future condition, regulation, or restriction the Council may impose, this would be a binding contract, and would control the complainant. (*R. R. Co.* vs. *Ryan*, 153 U. S. 436.) Whatever the rights of the complainant may have been under such a stipulation, it would surrender them and come within the absolute domination of the City Council. The courts could not review any ordinance to discover if it be within the lawful exercise of the police power, for the complainant would be bound by its contract to obey the ordinance, be it police regulation or not.

"These conditions, regulations, and restrictions already prescribed by the City Council appear to be stimu-

lated by a desire to press and control, perhaps defeat, the existence of the complainant, and so are not the lawful exercise of the police power.

"Let the case be remanded to the Circuit Court with instructions to modify the terms of the injunction therein granted, so that it may conform to the principles declared in this opinion, the costs of the case to be equally divided between the parties."

Judge Brawley delivered the following dissenting opinion:

"I concur in the result, but am not inclined to assent to so much of the opinion as holds that a telephone company, such as is described in this case, and whose business is local in character, is within the purview of the act of Congress of July 14, 1866, relating to telegraph companies."

Upon the rendition of its decision by said Circuit Court of Appeals, and entry of decree, the city applied to this court for a writ of *certiorari*.

REASONS FOR WRIT OF CERTIORARI.

Your petitioner submitted the following reasons why the said decree of affirmance should be brought here for review by this Court:

First. The questions of law involved in the affirmed decree as above stated are of great importance and general interest, because they very materially concern the extent and the limits of the power of municipalities over the construction and operation of telephone companies in their midst, and, if allowed to remain unchallenged and settled by said decree of affirmance, will of necessity govern future decrees involving such questions in said circuit, and greatly affect similar litigation arising in other circuits.

Second. As affecting the rights of all telephone companies and the powers of all municipalities in this country, it is most desirable, if not necessary, to have it authoritatively decided. 1st. Whether any telephone company is embraced within the scope of the said act of Congress of July 24, 1866. 2d. Whether a telephone company doing a *local* business only is within the purview of said act. 3d. Whether a telephone company doing both an interstate and a *local* business is beyond the interference or control of a municipality as to its *local* business as well as its interstate business.

The said opinion and decree of affirmance is in direct conflict with decisions of this court as to the control of State authorities over telegraph messages or freight charges of a local, and not of an interstate character.

Third. It is of great importance that municipalities should know to what extent they can impose restrictions and conditions upon telephone companies using their streets.

Fourth. That the Circuit Court of Appeals erred in deciding that a telephone company is embraced in the act of Congress of July 24, 1866.

Fifth. That the Circuit Court of Appeals erred in holding that the complainant comes within the protection of the said act of Congress. 1st. Because its business is of a local and not of an interstate nature. 2d. Because, even if the complainant is entitled to the protection of said act as to its business in connection with the Western Union Telegraph Company, yet it was not put by said act above municipal control as to its purely local business, viz: Messages which never left the limits of the city, much less the limits of the State.

Sixth. The Circuit Court of Appeals erred in holding that, although the lines of the complainant were erected and constructed under the terms set forth in the contract—ordinance of June 26, 1884, yet that the company had the right to remain in occupancy of the streets of your petitioner after said ordinance had been repealed by a valid ordinance.

Seventh. The Circuit Court of Appeals erred in holding that the restrictions and conditions set forth in the two ordinances heretofore mentioned of your petitioner, and approved September 10, 1895, and commented upon in the opinion of that court, were void as not being lawful exercise of the police powers of your petitioners.

The said writ having been granted by this court, the appellant now urges the said fourth, fifth, sixth, and seventh reasons as setting forth errors calling for a correction by this court of the decrees of the lower courts.

ARGUMENT.

The several questions which materially affect the merits of this controversy are as follows:

1st. Does the said act of Congress of July 24, 1866, embrace within its scope telephone companies?

2d. Even if it embraces any of such companies, does it cover the Richmond Exchange of the complainant company?

(*a*) As to messages sent by 'phone to the office of the Western Union Telegraph Company, thence to be forwarded over the lines of the latter company to some point without the State of Virginia, or messages received from some such point over the wires of said telegraph company at its office, and sent from there over the wires of the complainant company to the intended recipient in Richmond?

(*b*) Even if the act applies to such messages, can it give any protection to telephonic messages sent from one part of the State of Virginia to another, or from one point in the city of Richmond to another?

3d. Do the lines and business of the company "constitute a part of the postal service of the United States"?

4th. Even if the entire business of the company would have been within the scope of said act, had its lines been established after it had accepted the terms of said act, and

been constructed under its protection, yet having been constructed and established under the contract contained in said ordinance of June 26, 1884, can it now refuse to comply with the terms of said contract, and claim as a protection its delayed acceptance of February 13, 1889?

5. Did the Council of the city have the power to pass the repeal ordinance of December 14, 1894, and is it sufficiently broad to require the removal of the poles and wires already erected?

6th. The decree of the Circuit Court is erroneous, in that it empowers the company to enter upon and use the streets free from any control or regulation of the city, however reasonable.

7th. The decree of affirmance is erroneous in affirming in the main the decree of the Circuit Court, and also in declaring the provisions and conditions of the two ordinances approved September 10, 1895, to be improper and void.

A discussion of the above questions will be a substantial presentation of all the errors complained of.

Before discussing the points in dispute, it may be well to state that there are some questions, which we recognized in the lower courts and here recognize, need not be discussed, as long as the law pertaining to them shall remain as now declared by the Supreme Court of the United States.

1st. We recognize the constitutionality of the above-mentioned act of Congress. (*Pen. Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S., 1; *Tel. Co.* v. *Texas*, 105 U. S., 460; *West. Un. Tel. Co.* v. *Massachusetts*, 125, U. S., 530; *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S., 92 and 149 U. S., 465.)

2d. We recognize, as declared by act of Congress, that all streets, which are letter-carrier routes, are post roads. (*St. Louis* v. *West. Un. Tel. Co.*, 148 U. S., 92 and 149 U. S., 465.)

3d We recognize that under said act of Congress a telegraph company can obtain a right of way for its poles

and wires through a city and along its streets against the wish of the municipality. (*St. Louis* v. *West. Un. Tel. Co.*, 148 U. S., 92 and 149 U. S., 465.)

With these questions eliminated, we come to the discussion of the first question in dispute as above stated

SCOPE OF THE ACT.

The complainant company claims that it is embraced within the meaning of that act. It claims that the words "any telegraph company" embrace and include telephone companies. As was said by the Supreme Court of the United States in *St. Louis* vs. *West. Un. Tel. Co.*, 148 U. S., 92: "This is not the first time that an effort has been made to withdraw corporate property from State control, under and by virtue of this act of Congress."

It may be, that messages sent by telephone, like those sent by telegraph from one State to another, are a species of interstate commerce. But it would not follow from that that telephone companies are embraced in said act, and entitled to the extraordinary privileges granted thereby. The carrying of passengers and freight are also species of interstate commerce, but it is not pretended that railroads come within the scope of the act. Railroad companies were omitted from the scope of the act, although well known at the time of its passage as necessary means of interstate commerce. Why, then, is it claimed that telephone companies are covered by its terms, when such companies had never been heard of at the time of the passage of the act? Only because of a partial similarity between a telegraph and a telephone!

In the terms of the act of Congress there is nothing which tends to suggest that the words "telegraph" and "telegram" were intended to be read, except in their well-known and ordinary acceptations. No better idea of the general acceptation of those terms can be given than the

definitions given by the *Albany Evening Journal* of August 6, 1852. That journal, speaking of the coinage of a new word, said: "It is telegram instead of telegraphic dispatch or telegraphic communication. * * * * Telegraph means to write from a distance. Telegram, the writing itself, executed from a distance." (See Century Dictionary under "telegram.") On the other hand, the word "telephone" is defined in the contract in this case between the Western Union Telegraph Company and the National Bell Telephone Company as "an instrument for electrically transmitting or receiving *articulate speech*." (See page 50, article 2.)

It is true, that telephone wires, like telegraph wires, carry communications between persons distant from each other. It is true that among the material means necessary for the carrying of such communications, are poles and wires, and that the power used for such transmission is electricity. But there the similarity stops. The art of conveying a message by telegraphic dots and dashes is distinct from that of transmitting a conversation by a telephone. The difference between the two arts is fully recognized in the contract last above mentioned. In that contract it was virtually agreed that the Western Union Telegraph Company was not to go into the telephone business, and the telephone company was not to go into the telegraph business. (See page 50, article 6; page 51, article 13 (1); page 53, article 15 (3).) That contract furnishes a practical illustration of the well-recognized difference. That contract was doubtless the end of the litigation alluded to in the telephone cases (126 U. S., on page 546-7). So separate and distinct are the arts, that the Morse patent for the telegraph did not prevent the issuance of the patent to Bell for the telephone, as for a "*new and unknown art*"—a recognition that the two arts or scientific discoveries were distinct from each other. In the telephone cases *(supra)* this court recognized and adjudged that Mr. Bell had discovered not merely a new instrument for the transmission of sound, but had discovered the new and unknown art of transmitting the sounds of articulate speech. And it

is because of this difference that the American company and its branch companies have been enabled to reap their royalties. After so important an announcement by the highest judicial voice of the nation, can it be successfully contended that the terms, descriptive of the earlier art, and found in the Act of Congress, passed before the discovery of the later art, embraces the latter? Can a discovery be so separate and distinct from all those which preceded it as to entitle the discoverer to a patent for a new and unknown art, and yet be embraced within the scope of an act, passed previous to the discovery, and intended at the time of its passage to embrace only one art, which was then known? We submit that such a suggestion, embodying a palpable contradiction, cannot be acceptable to a court of justice.

In the construction of the words "any telegraph company," as used in the act of Congress, *the effect and extent of the power* conferred by the act should have great weight. While it is true that the power conferred by said act of Congress upon telegraph companies has been adjudged and established, yet it will not be denied that the granting of such power was a great advance upon what had theretofore been regarded as the extent of the power of Congress under the interstate commerce clause of the Constitution. Before the decision of *Pen. Tel. Co.* v. *West. Un. Tel. Co., supra,* the power of Congress as to interstate commerce had been regarded as confined to protecting such commerce, when existing, from being interfered with by the States. But by the act under discussion Congress claimed the right to enlarge the powers of the instrumentalities of interstate commerce. It ceased confining itself to merely preventing a State from hampering the instrumentalities of commerce, existing within its limits; it claimed the power to authorize such instrumentalities, existing in one State, to enter another, and not only to pass over, but to permanently occupy portions of the highways of that State.

We repeat that it will not be denied that the act confers extraordinary power upon the instrumentality named in it.

We call attention, however, to the fact that while Congress thus claimed the right to confer this great power, it did not in fact confer it, except upon *one* of the instrumentalities of interstate commerce, viz., telegraph companies. And we insist that no presumption should be allowed, that it was the intention of Congress to confer it upon any other instrumentality.

"Grants of immunity from legislative governmental control are never to be presumed." (*Ruggles* vs. *Illinois*, 108, U. S., 526-531.)

This principle of construction, which is here asked to be applied, is nothing more or less than that the rule applied in the construction of charters or grants of privileges or franchises. No reason can be given why the same rule should not apply. The power given in the said act of Congress is a privilege, and therefore to be construed like any other franchise granted any other corporation. In Cooley's Const. Limt'ns, 6th Ed., p. 487, it is said:

"'When a State,' says the Supreme Court of Pennsylvania, 'means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power which belongs to her, it is so easy to say so, that we will never believe it to be meant, when it is not said. In the construction of a charter to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation. If the usefulness of the company would be increased by extending (its privileges), let the Legislature say it, but let it be remembered that nothing but plain English words will do it.' This is sound doctrine, and should be vigilantly observed and enforced.

"And this rule is not confined to the grant of a corporate franchise, but it extends to all grants of franchises and privileges by the State to individuals, in the benefit of which the people at large cannot participate."

See also *Mills* vs. *St. Clair County*, 8 How., 569; *Saginaw Gas Co.* vs. *Saginaw*, 28 Fed. Rep., 529-39-40.

There are serious difficulties as to possession of such power by telephone companies, which do not exist as to telegraph companies. The great multiplication of poles and wires needed for telephone service is no slight evil in cities. The Supreme Court of the United States in *St. Louis* vs. *West. Un. Tel. Co.*, 148 U. S., pages 92 and 99, recognized this evil. The Court said:

"The use which the defendant makes of the streets is an exclusive and permanent one, not one temporary, shifting and in common with the general public." * * *

"It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. * * * By sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use for purposes of travel entirely appropriated to the separate use of companies and for the transportation of messages."

This is no fancied, but a real evil. The experience of cities teaches that, when the streets are open, without municipal restraint, to the occupancy of corporations for their instrumentalities of trade, such as gas and water pipes and wires for the various electrical purposes, corporations are frequently formed merely for the purpose of forcing the earlier and existing corporations to buy them out. In the meantime the streets have been used and occupied and injured for their purposes. The language of Allen, Judge, in *Pierce* vs. *Drew*, 136 Mass., on page 85, although used in a dissenting opinion, is entitled to great weight because of its strong statement of facts, known of all men. He says: "When a telegraph line consisted only of a single row of small posts, with a few wires, the matter was of less importance. But common observation shows that now the posts

are large and numerous, fitted with cross beams adapted for layer after layer of almost countless wires; and the establishment of the different kinds of electrical lines involves to some extent the destruction of trees along the highways or streets, an occupation of the ground, a filling of the air, an interference with access to or escape from buildings, an increased difficulty in putting out fires, an obstruction of the view, a presentation of unsightly objects to the eye, and a creation of unpleasantness in the wind."

The use and occupancy of a street by a telegraph company is a matter of but small moment, for the poles and wires upon its route from its office to the limits of the city are comparatively few, and go through the city as directly as possible. It was doubtless on account of this nature of their occupancy that Congress gave such companies the large power authorized by said act. But the use necessary for a telephone company is of course far greater. It ramifies a whole city. It goes upon any street where it can get sufficient subscribers. The result is that a large portion of the streets of a city are invaded by the poles and wires of such a corporation. It does not merely pass through, but it permeates a city. If such a company should have given it the power conferred by said act of Congress upon telegraph companies, it would soon be beyond the control of the city authorities, even as to the designation of its routes. Is the company to be allowed to determine upon what and how many streets it will go? Whether it shall confine its lines to present needs, or by its extensions anticipate and prevent competition? Ought the possession of such a power to be recognized unless declared in " plain English words? "

We recognize the tendency of some of the highest courts to take what may be called a business view of questions of this kind, and that they seem to feel it their duty to lean strongly in their decisions towards the maintenance and encouragement of business enterprises. A conservative tendency in that direction is doubtless wise. But it would be far beyond the reach of conservatism for a court to hold

that an act, authorizing one class of corporations to enter upon and occupy in part the streets of a city *without its consent* (an invasion rarely ever authorized by a State) embraces another and different class of corporations unheard of at the time of the passage of the act. The Supreme Court of the United States has in its decisions delivered, since the case of *Pen. Tel.* vs. *West. Un. Tel. Co., supra*, shown a strong determination to uphold as far as possible municipal control, even over that class of corporations which are specified in said act. *(St. Louis* vs. *West. Un. Tel. Co., supra.)*

We submit that the said act as it now reads should not be construed to embrace telephone companies An examination of each of the significant words in the act will show that it was not intended to apply to any company, like a telephone company, confining itself originally, and in the main still, to some little locality, permeating with a web of wires the narrow limits of that locality, running wires from house to house, and to some central station, for the purpose of communication between the residents of that neighborhood. It authorized the passage "through and over" "the public domain," or "over and along" the "military or post roads of the United States." These words clearly indicate that Congress had in its thoughts some great instrumentality of interstate commerce then existing, and whose nature it was to pass "through and over" great areas of country. That it had in mind this idea of great distances is further seen from the fact, that when authorizing the pre-emption of public land for stations, the act restricts the location of such stations, so that they shall "not be within fifteen miles of each other." Does not such a limitation demonstrate that Congress was not providing for a telephone company?

The words "telegrams" and "rates" also clearly indicate what class of companies Congress had in mind at the passage of the act.

A fair way to look at this act is to treat it as an ordinary contract. It is a governmental contract, being the grant-

ing of a privilege upon certain terms. Treating it as a contract, let us see by means of an illustration the scope of those terms. "A," we will suppose, is on July 24, 1866, the owner of a large tract of land. On that day he makes a contract with "B" company, that it might for twenty years run its telegraph lines through and over said tract, as it might see fit, but upon certain terms, then agreed upon. During that twenty years the company begins to erect telephone lines up and down and across said tract, claiming that the words telegraph lines embraced telephone lines. "A" denies the company's right, insisting that he only contracted as to telegraph lines. Is there any doubt but that a court would necessarily adopt the construction contended for by "A"? Substantially the same question is presented by the record in this case.

In truth, we need not go out of the record for an illustration to show how erroneous is the construction of the act contended for by the appellee. On page 12 of the record it appears that the appellee on February 13, 1889, filed with the Postmaster-General its acceptance of said act. In that acceptance it described itself as the Southern Bell Telephone and Telegraph Company. Its acceptance of the offer contained in the act is as follows: "And the said company does especially agree that *telegrams* between the several departments of the government and their officers and agents shall at all times have priority over all other business in their transmission over the lines of said company, and the charges for such *telegrams* shall not exceed the rates annually fixed by the Postmaster-General."

Imagine that this litigation had never arisen, and the Postmaster-General should attempt, under that acceptance, to fix the charges for the use of telephones by the government, what would be the result, should the company deem it to its interest to deny the right of the Postmaster-General? The acceptance would be construed like the acceptance of any contract, viz: By the terms of the offer *as understood at the date of the offer*. At the time of the offer by the act

"telegrams" were well known and understood, and telephonic communication was an "unknown art." Would it not follow, then, by every respectable and recognized rule of construction, that the suggested claim of the Postmaster-General would have to be denied, and it be declared that the company had not assumed by its acceptance any such burden? Is it not also true that by its acceptance it only acquired privileges commensurate with its burdens. As the act does not bind it as to telephonic communications, neither can it be held to furnish any protection to the poles and lines used for such purposes.

That Congress intended that the rights granted under said act, as now found in the Revised Statutes, should be restricted as to the recipients of its benefits, can be seen from the fact that in section 5265, it prohibits any assignment of any right or privilege acquired thereunder.

The question is not what Congress might have done, but what it has done. It is possible that Congress might have given the same powers to a long-distance telephone company for its main lines had such a company existed on July 24, 1866. But it admits of doubt, whether Congress would at this day pass an act giving such a power to a long-distance telephone. However that may be, it is more than improbable that Congress would ever give such a power to a company as to its local wires, running from the central station to residences or business-houses; even if occasionally some of them may transmit a message to a telegraph station. Congress would consider and be guided by the main object and the general result, not the incidental use and minor effect.

We admit that a few decisions can be found construing the words "telegraph companies" to include in its meaning telephone companies. But it will be found upon examination of the cases that the decisions are based upon the phraseology of the respective statutes which were under discussion. However that may be, we insist that in the light of the decision of this court in the "Telegraph cases," *supra*,

no act of Congress, passed prior to the issuance of the Bell patent, in 1876, can be construed as embracing telephone companies under the term "telegraph companies." An act of Congress like the one under discussion should never be construed like a provision of the Constitution may be construed: as being a creation or reservation of a governmental power, and, therefore, not intended to be restricted by details, or to certain instrumentalities. A statute giving a franchise is not a reservation, but a surrender of sovereignty, and is, therefore, to be construed strictly.

The leading case relied upon by the appellee is *Attorney-General* vs. *Edison Tel. Co.*, L. R., 6, Q. B., Div., 244. This case was the first one to put such a construction upon those words. It has been in some instances blindly followed. The courts have ignored the fact that the decision turned, not upon what the words meant in their ordinary acceptation, but upon what they meant *as used in and defined by the English statutes.* In its decision in that case the court went into a detailed discussion of the words of the English statutes. It laid stress on the fact that the English act of 1863 defined a "telegraph" to mean "a wire or wires used for the purpose of telegraphic communication," and that the act of 1869 broadened the meaning still more by declaring that in addition to its meaning under the act of 1863, it should also mean "any apparatus for transmitting messages or other communications by means of electric signals." The decision of the court evidently rested upon the manifest purpose of Parliament apparent upon the face of the act to make the words as broad in their meaning as possible. And it should be remembered that the English act was not, like the act of Congress, one by which a corporation was greatly freed from "legislative governmental control," but was one by which the government declared its purpose to retain very great control over the telegraph. The former was a declaration for the retention of power, the latter a declaration of surrender of sovereignty. Surely the rules of construction must be different where the purposes are so dif-

ferent. Yet this is the decision, which several courts have followed, as if it construed the words of the English act by their general acceptation, instead by the definition set forth in the act itself.

The next case is that of the *Wisconsin Tel. Co.* vs. *Oshkosh*, 62, Wis., page 32. In that case the court, after noticing the English case just commented on, said: "If there remains any doubt as to the power given to charter a telegraph company being sufficiently broad to include a telephone company, then it must be dispelled by the general clause above quoted from section 1771, to-wit, 'for any lawful business or purpose whatever,' &c., for by a well-settled rule of construction these general words extend to things of a kindred nature to those specifically authorized by the section, and hence whatever is of a kindred nature to telegraphing, which most certainly include telephoning." Can it be said that that decision was based upon a construction of the words "telegraph company," or upon the words "for any lawful business or purpose whatever?" Certain it is, that the decision should have been put upon the latter ground, and any assertion that the words telegraph company included a telephone company, was virtually an *obiter dictum.*

In the case of *Cum. Tel. and Tel. Co.* vs. *United States*, 42 Fed. Rept., 273, the statement of the facts show that the company derived its rights from an ordinance of the city of Nashville recognizing it as a telephone company.

In the case of *Duke* vs. *Cen. N. J. Tel. Co.*, 53 N. Jer. Law., pp. 341-5, the court in discussing the New Jersey act, said:

"Telegraph acts do not define the kind of business in which the corporation shall engage, apart from the provision that the corporators shall subscribe stock for the construction of a telegraph line. The name of stock corporation need not indicate the business proposed to be transacted. Any title can be adapted. The only limitation

upon the scope of the business is that it must be within that for which a line of telegraph, in performing its public functions, is used."

It cannot be disputed that if the court construed aright the New Jersey statute, there was no necessity for that court to attempt to prove that the words "telegraph company" in their general acceptation include a telephone company.

The remaining case cited by the complainant is that of the *Ches. and Po. Tel. Co.* vs. *Balt. and Ohio Tel. Co.*, 66 Md., 399. We simply ask the Court to read what the Court says on page 410. It there appears that the Maryland statute called for no effort to enlarge the words "telegraph company."

Such are the authorities offered as reasons why this Court should construe the act of Congress to embrace telephone companies. Each one of them turning upon the peculiar phraseology of the statute then under discusssion. Not one of them throws any light upon the intent of Congress nor upon the terms used in said act of Congress. That act must be construed by three simple rules.

1st. The terms used are to be read according to their "general acceptation;" there being no word of uncertain meaning used.

2d. By the object in the mind of the law-maker at the time of its passage.

3d. By the inconveniences that would arise by construing the words to embrace telephone companies.

We have attempted to show, that tested by any one or all of these rules, the strained construction put by the appellee upon the act is unwarranted, and we submit that the Circuit Court erred in decreeing that the company was, "in accordance with the terms and provisions under the protection of the act of Congress of the United States, ap-

proved July 24, 1866, entitled to the injunction set forth in the decree complained of," and also that the Court of Appeals erred in affirming that decision.

II.

SCOPE OF THE COMPANY.

Even if telephone companies, doing interstate business or commerce, are embraced in the terms of said act, yet the question still remains whether the Richmond Exchange is of that character—is *its* business of the nature of interstate commerce?

In discussing this latter question we must notice it in two aspects:

1st. As to the messages sent and received in connection with the Western Union Telegraph Company to and from points outside of the State.

2d. As to those messages which never go beyond the limits of the city, or State.

The character of the first stated class of messages is accurately described in "Bell Ex. No. 15," on page 70, to which we have previously alluded. That exhibit shows that the message is not transmitted from the telephone wires to the telegraph lines, nor *vice versa*. In one class of messages, which are to be sent beyond the State, the clerk at the 'phone in the office of the telegraph company receives the message through the 'phone, *puts it in writing and hands it to the operator of the Western Union Telegraph Company*. In the other class of messages, which are received from beyond the State, "the Western Union Telegraph operator who receives the message, *puts it in writing and hands it to the 'phone clerk of the company*, who has charge of one of the 'phones in its office in Richmond, who *calls up*

the person to whom the message is addressed over the 'phone, and delivers it to him through the 'phone. This method of delivering and receiving was done up to November 1, 1896, under the contract set forth in "Bell Ex. No. 4." By contract, the clerk at the 'phone in the Western Union telegraph office is, when receiving and delivering messages over the telephone, the agent of the telephone company; "subject to its rules and regulations." (See page 53, subdiv. 4.) As that contract expired on that day, that course has been pursued since that day by silent understanding, without any contract. The company does not allege in its pleadings, nor prove by its evidence, that the Richmond Exchange does any interstate commerce unless through the Western Union Telegraph Company.

The question is, whether these messages, before they are delivered by the agent of the telephone company to the Western Union telegraph operator, have begun so to move as to become of the nature of interstate commerce. While the message is being spoken it is still under the control of the speaker. It has not even left his possession. It is more subject to his dominion than is a barrel of flour or a bar or iron, when being put upon a dray to be carried to a railroad depot. Until completely spoken, it is still in the process of delivery. Is the inconceivable moment of time to be computed between the speaking into the receiver and the hearing at the transmitter. But admit that that moment of time is to be considered, yet has the movement become that of interstate commerce. Suppose that the dray, which we have used for illustration, has upon it the article of merchandise, and is on its way to the depot, will the movement have thereby become that of interstate commerce? We submit it will not. Or, suppose that it has reached the depot, but has not been delivered, will it have become of the nature of interstate commerce? If so, at what point was the change brought about? Was it when in sight of the depot, or after it was backed up to the receiving door? We insist that at neither time was any such change wrought. That

great constitutional privilege does not depend upon any such indefinite and shifting conditions. That principle only comes into play when the article or object of transportation has been committed to a common carrier for transportation to some other State; and the point of its beginning is not, where it has been given to some person or local carrier to be delivered to some other carrier in the same locality, which alone, or in customary connection with others, transports such articles or objects into another State. So, here the reception of the message by the 'phone clerk is but the reception by the telephone company, and it does not come into the possession of the telegraph company, until written out by the 'phone clerk, and delivered to the operator of the Western Union Telegraph Company.

In *Coe* vs. *Errol*, 116 U. S., 517-528, the Supreme Court had before it, and decided, when the movement of an article becomes interstate commerce. It said:

"'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the State has begun.' But this movement does not begin until the articles have been shipped or started for transportation from one State to the other. The carrying them in carts or other vehicles, or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, or never put in course of transportation out of the State. Carrying it from the farm or the forest to the depot is only an interior movement of the property entirely within the State for the purpose, it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself. Until ship-

ped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing."

A similar distinction was drawn by this court in *Hopkins* vs. *United States*, decided October 24, 1898. In the former case this court held that the instrument or facility used for starting an article upon a course of interstate transportation was not an instrumentality of interstate commerce. In the latter case it held that the instrument, or facility, used for receiving and disposing of an article which had been in such a course was not an instrumentality of interstate commerce. In the latter case it used these words: "The selling of an article at its destination, which has been sent from another State, while it may be regarded as an interstate sale, and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce. * *

Granting that the cattle themselves, becausing coming from another State, are articles of interstate commerce, yet it does not follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce. * * * The commission agent, in selling the cattle for their owner, simply aids him in finding a market; but the facilities thus afforded the owner by the agent are not of such a nature as to thereby make that agent an individual engaged in interstate commerce." * * *

This is the rule where the question is as to the power of taxing property belonging to the instrumentality claiming the protection of the constitutional provision. Ought not this rule to be still more guarded, when applied not to mere taxation of property but brought to bear upon the right and duty of local governments to protect their highways, which the claimant proposes to take and permanently occupy to the *pro-tanto* exclusion of the general public? In the former case the question is merely as to the exercise of a

power, while in the latter it is as to the right to protect property from invasion and seizure.

In the lower court the appellee relied upon the line of cases beginning with "Daniel Ball," 10 Wal., 557, and ending with *Railroad Co.* vs. *Penn.*, 136 U. S., 114. But we submit that none of those cases controvert the case of *Coe* vs. *Errol, supra.* In fact, in the opinion in the latter case the Daniel Ball case is referred to and distinguished. The principle recognized in the Daniel Ball case and the subsequent cases, ending with *Railroad Co.* vs. *Penna.*, 136 U. S., 114, is that an instrumentality of commerce, *not municipal or local in its nature and general business,* may become an instrumentality of interstate commerce by its business, although itself working entirely within the limits of one State. Justice Lamar in the last-mentioned case called attention to the fact that the railroad in that case was a link in a "through line."

In *Hopkins* vs. *United States, supra,* this court noticed this line of decisions, and pointed out the clear distinction existing in those cases. It used these words: "But in all the cases which have come to this court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce." Here the distinction is still broader. Here the "local facility" is not "provided for the transaction of *such* commerce." It was provided for local use—and in its general use is still so confined.

The case of *Coe* vs. *Errol* was dealing with merely local or municipal instruments of commerce, such as "carts or other vehicles, or even floating them to the depot." That case was cited with approval in *Kidd* vs. *Pearson*, 128 U. S., 1-24, and was also recognized as correct in *Lehigh Valley Rd.* vs. *Penna.*, 145 U. S., 192. We also ask consideration of the last-mentioned case, as showing that this court is not

inclined to push the doctrine of interstate commerce beyond what necessity demands.

We submit that the appellee comes within the principle of *Coe* vs. *Errol*. It is local and municipal in its nature. It does not, nor does it pretend to, partake of the nature of a long-distance telephone. It no more partakes of the nature of an instrument of interstate commerce than would a street-car, whose owner had agreed with a through line of railroads to haul its passengers from one depot to another at a stipulated price. Neither the hackman who drives one to the depot, nor the driver of the wagon which carries one's trunk to the same place is engaged in interstate commerce. The street car, the hack, and the wagon would each in some remote way aid interstate commerce—but a court would not regard such incidental possibilities. Each would be regarded as "a local facility." It would hold that its true, its real business was local, and not affected by the interstate commerce clause of the Constitution.

So the appellee is not an instrumentality of interstate commerce, but, like the hack, the wagon, or the street car, it is only an *intermediary* between the consignor and the required instrumentality of interstate commerce. It does not even partake of the public service like the above-named vehicles. Each telephone wire only renders service to a limited few at the most. Some of them only render service to a single subscriber. In this respect there is a marked difference between telegraph and telephone lines. The former is open to the public in general, the latter limits its services, as above stated.

Such we submit is the nature and business of the Richmond Exchange of the Southern Bell Telephone and Telegraph Company. The telephone lines are not a link between other lines running into the State on the one hand, and running out of it on the other. They are a mere local vehicle to carry the messages to the office of the common carrier of messages, by whom alone it is "actually launched on its way to another State." Carrying them from the tele-

phone subscriber or patron to the telegraph office " is only an interior movement of the property entirely within the State for the purpose, it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself."

We submit that the company cannot be regarded as doing an interstate commerce business even as to the messages which it delivers to or receives from the Western Union Telegraph Company.

Passing to those messages, which are admittedly *infra* State commerce—messages, most of which never leave the corporate limits of the city, and none of which ever go beyond the limits of the State; is it not still more certain that the Circuit Court erred in entering said decree; " the Court intending by said injunction to enjoin the city from interfering with the *local* business and messages as well as those of an interstate character." It is hard to understand upon what principle the Circuit Court based its decree so far as it applies to what the Court itself recognized as " local business and messages." Yet the Court of Appeals affirmed that error. As was said in the case of the State Freight Tax, 15, Wal., 232-277, and quoted in *Fargo* vs. *Michigan*, 121 U. S., 230-241: " Doubtless a State may regulate its internal commerce as it pleases."

In *Wabash Rly. Co.* vs. *Illinois*, 118 U. S., 557, the same principle was more fully announced. Said the Court: " The charges for these might be within the competency of the Illinois Legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States or interstate commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the States. It has often been held in this court, and there can be no doubt about it, that there is a

commerce wholly within the State, which is not subject to the constitutional provision," &c. (See also *Dow.* vs. *Beidleman*, 125 U. S., 680; *Geo. Bank Co.* vs. *Smith*, 128 U. S., 174-179.)

The Supreme Court of the United States has been called upon several times to recognize this power of a State, even as to telegraph companies, claiming the same protection under the same act of Congress that the complainant company here claims. In *Telegraph Co.* vs. *Texas*, 105 U. S., 460-66, it said:

"It follows that the judgment, so far as it includes the tax on messages sent out of the State, or for the government on public business, is erroneous. The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a State, and does not affect other nations or States or the Indian tribes, that is to say, the purely internal commerce of a State belongs exclusively to the State, is as well settled as that the regulation of commerce which does affect other nations or States or the Indian tribes, belongs to Congress. Any tax, therefore, which the State may put on messages sent by private parties, and not by the agents of the government of the United States, from one place to another exclusively within its own jurisdiction will not be repugnant to the Constitution of the United States. Whether the law of Texas in its present form can be used to enforce the collection of such a tax is a question entirely within the jurisdiction of the courts of the State, and as to which we have no power of review." (See also *West. Un. Tel. Co.* vs. *Pendleton*, 122 U. S., 247-257; *West. Un. Tel. Co.* vs. *Massachusetts*, 125 U. S., 530-548; *West. Un. Tel. Co.* vs. *Penna.*, 128 U. S., 39-40. Such being the law as to telegraph companies, which are mentioned by name in the act, why should it not be the law as to telephone companies also? It was upon this point that Brawley, Judge, dissented in the Circuit Court of Appeals, withholding his assent from "so much of the opinion as holds that a tele-

phone company, such as is described in this case, and whose business is local in character, is within the purview of the act of Congress of July 14, 1866."

Again we submit that the Circuit Court erred in its decree when it declared that the complainant company was protected by said act of Congress even as to its "local business and messages," and that the Court of Appeals erred in affirming such a decree.

III.

POSTAL SERVICE.

We come next to the position taken by the appellee in the lower courts, that the business and lines of the company "constitute a part of the postal service of the United States." It is claimed by the company that if it forms a part of that service, then it is protected from interference, even as to local messages. No authority can be found in support of such a position. It cannot be tenable. If it were, then no State would have any power to put restrictions or regulations upon any railroad within its borders, although not engaged in any way in interstate commerce. We know, however, from every respectable decision that States do possess such power. Yet a railroad actually carries the United States mail. No case decided by the Supreme Court puts the constitutionality of the act upon the ground that the telegraph forms a part of the postal service. Every decision of that court construing said act of Congress finds the power of Congress to enact such a statute in the clause of the Constitution of the United States as to interstate commerce. In the quotation above made from the decision in *Telegraph Co.* vs. *Texas, supra*, the court holds that while the company will be protected from State interference as to

messages sent "by the agents of the government of the United States," yet it can put "any tax" it may choose "on messages sent by private parties, &c., from one place to another exclusively within its own jurisdiction."

That decision, and the several others affirming it, show that the fact that the officials of the government of the United States use the company's lines on official business, only protects the company as to the messages sent by such officials. Such being the law as to telegraph companies, we can imagine no reason why the protection afforded telephone companies should not at least be as limited.

But neither telegraph nor telephone companies form a part of the postal service—for those words only embrace the instruments of transmission and the transmission itself of information by the government. It has never been applied to the instruments owned, maintained, and operated by individuals or corporations for the purpose of private gain. It is true, that the government may use a 'phone for its own use, but that makes it no part of the postal service. The government may need and may have electric lights in its post-offices and other government buildings, but that would not bring electric-light companies under any clause of the Constitution. If the government operated telegraph and telephone plants and transmitted messages for the public, it would then become a part of the postal system. But at present it is only an individual, not a governmental undertaking or instrumentality. The government has no connection with any telephone company, and merely hires any needed 'phones like any other subscriber. (See record, page 74, sub-div. 3.)

IV.

UNDER ORDINANCE, NOT ACT.

The next ground upon which we insist that the said decree is erroneous is, that even if the entire business of the company would have been within the scope of said act, had its lines been established after it had accepted the terms of said act, and constructed under its protection, yet having been constructed and established under the contract contained in said ordinance of June 26, 1884, it cannot now refuse to comply with the terms of said contract. The company claims that it is released from all the obligations of said contract entered into on June 26, 1884, by reason of its acceptance of said act of Congress on February 13, 1889—a voluntarily delayed acceptance. In other words, it claims that having exercised its alleged option to enter upon and occupy the streets of said city, either under said act of Congress or under said contract ordinance of the city, and having selected to enter, and having entered under the terms of said ordinance, it can, when it sees fit, plead its subsequent acceptance of said act as a protection against and a nullification of the terms of said contract ordinance, voluntarily sought for and accepted by it.

Surely the complainant was not obliged to proceed under the power given by the said act, and force all necessary routes from the city of Richmond. It had ample power to enter into a contract with said city as to the use of its streets, and to use them under and subject to said contract. We cannot think that this can be disputed. If proof of it be needed, the compiainant's bill and exhibits furnish it. The complainant entered upon the streets of said city in 1884 under the terms and conditions of the ordinance of June 26, 1884. Yet the complainant admits that it never accepted the terms of the act of Congress until February 13, 1889. No one will pretend that the act ever applied to the com-

plainant before its acceptance of it was filed. Under what then was the complainant acting in the meantime? Only under the terms and conditions of the contract contained in said ordinance. What then was the effect of the acceptance of said act? Did it destroy the obligation of a contract? We admit, that in a proper case, "It is no answer to this to say that it interferes with the validity of contracts, for no provision of the Constitution prohibits Congress from doing this as it does the States," &c. (*Mitchell* vs. *Clark*, 110 U. S., 633-643.) But we submit that no such intention should be *inferred* of Congress. That before such a construction should be put upon an act, the intention of Congress should be most manifest. At least judicially, Congress is not to be *presumed* to intend a wrong.

Can it be pretended that the act of Congress forbids and prohibits any telegraph company, after accepting it, from making with a city for the use of its streets any kind of contract which might deem desirable? Such a pretention would make Congress a coddling nurse instead of a governmental shield. The power given by the act is simply a "permissive" one, not affecting in any way the company's former and corporate powers. (*West. Un. Tel. Co.* vs. *Mass.*, 125 U. S., 530-547, and 141 U. S., on page 44.) But if it be admitted that Congress did not intend to prohibit such contracts, then surely it cannot be earnestly claimed that Congress intended to destroy the obligation of such a contract entered into prior to the acceptance. It is far more probable that Congress would prohibit the making of such a contract, than that it would legalize a breach of it, after it had been made.

It is no argument against the contract, that, if the company had at first come in under the act of Congress, no provision would or could have been inserted as to a repeal. A party to a contract can voluntarily bind himself to terms more disadvantageous than the law would impose. "What a State may do is one thing, and what parties may contract voluntarily to do among themselves is quite another thing."

(*Hopkins* vs. *United States*, decided by this court October 24, 1898. Also, *Pierce* vs. *Somerset Ry.*, decided October 31, 1898.)

This court has decided that an instrumentality of interstate commerce may voluntarily bind itself to a State which it enters, with obligations, which the principles of law, applicable to interstate commerce, would not allow a State to impose, after the instrumentality had entered the State.

"The charter of the Baltimore and Ohio Railroad Company for constructing and working a branch railroad between Baltimore and Washington contained a stipulation that the company at the end of every six months should pay to the State one-fifth of the whole amount received for the transportation of passengers." The obligation was held binding. (*Railroad Company* vs. *Maryland*, 21 Wal., 456.) In its opinion the Court said:

"What amounts to a regulation of commerce between the State, or to a discrimination against the citizens of other States? This is often difficult to determine. In view, however, of the very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises, and its corporations, we cannot regard the stipulations in question as amounting to either of these unconstitutional acts."

In *Ashley* vs. *Ryan*, 153 U. S., page 436, a similar question arose, where the court approved the case of *Railroad Co.* vs. *Maryland*, and held that "a State, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation, organized under its laws, may impose such conditions as it deems proper, and the acceptance of the franchise implies a submission to the conditions, without which the franchise could not have been obtained." The court says on page 441:

"As it was within the discretion of the State to with-

hold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its power to impose whatever condition it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the State law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. We say voluntary assumption, because, as the claim to the franchise was voluntary, the assumption of the privilege which resulted from it partook necessarily of the nature of the claim for corporate existence. Having thus accepted the act of grace of the State and taken the advantages which sprang from it, the company cannot be permitted to hold on to the privilege or right granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought."

Could any language be more applicable to this case? In 1884 the company, not having attempted by an acceptance to bring itself within the benefits of the act of Congress, accepted the terms of the city ordinance. It said by its ordinance of 1884 you can come in on certain terms. The company accepted those terms. We submit that the Supreme Court spoke simply honest words when it said that a company should not be "permitted to hold on to the privilege or right granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought."

But the appellee claimed in the lower courts, that even if, prior to the repeal ordinance of 1894, it held its rights upon the streets of the city under the franchise ordinance of June, 1884, yet that, since the passage of the repeal ordinance, it had the right to remain upon said streets under the act of Congress, because it had been accepted by the appellee before such repeal. It contended that having had the right to enter under that act, it has the right to remain.

We submit that that contention is contradicted both by the object, as well as the language, of the act.

The object of the act was to encourage the extension of the lines of companies then "organized," or the construction, maintenance, and operation of lines by companies, "which may hereafter be organized." Those purposes, and those purposes only, are declared in the act. There is a total absence of any words suggesting any purpose to extend its privileges to any then existing line. It is not an act of ratification, but of authorization. It nowhere intimates any intention to be retroactive. Its view, its scope, its face, was turned entirely to the future. It nowhere suggests that any line then upon the public domain, or upon a highway, being a post route, might be brought under the privilege of the act, regardless of the fact that it might be on the public domain under a special contract of rental with the National Government, or on a highway under a specific agreement with a State or municipal government. They were supposed to stand under the *ægis* of their respective franchises or contract rights. It only offered its mantle of protection to those lines which it might induce any person or corporation to construct. A simple illustration will show that this is the proper interpretation of the act:

Let it be supposed that previous to the passage of the act a telegraph company had been allowed, under a written contract with the National Government, to erect a station upon certain unappropriated public land. After the passage of the act the contract expires. Before the expiration of the contract Congress passes an act declaring that upon the land so used there shall be erected a post-office or other public building. Before the expiration of the contract the company files with the Postmaster-General its acceptance of the act here under dispute. Could the company, under such circumstances, claim a right to *remain* on the land, because of its acceptance of said act? We submit that the courts would deny such a claim, and hold that the act must be strictly construed, and that it only applied to lines which

might be erected because of the inducements of the act, and after its acceptance.

One of the conditions of the act reads as follows: "Section 5628.—*Before* any telegraph company shall *exercise* any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by law."

This shows that it was intended by the act that the required acceptance should precede the construction of the lines. This requirement was but reasonable and to be expected. Surely the act never intended to authorize a company to enter upon the public domain, run its lines, and build its stations, and then accept the terms of the act. On the contrary, it very properly said, before you take to yourself public property, you must agree to tender the compensation required in the act. It was equally as reasonable to make this acceptance, a condition precedent as to the use of highways as well as to the occupancy of the public lands. This requirement was in consonance with what we have asserted was the object of the act, and what is declared in the title of the act, viz: "To aid in the *construction* of telegraph lines." (U. S. Stat's at Large, Vol. 14, page 221.)

If we are right in our contention, that a company, which had before the passage of the act entered upon the public domain under a special contract, could not remain thereon after the expiration of said contract by filing an acceptance of the act, then *a fortiori*, a company, which after the passage of the act ignored the offer of the act, and selected to construct its lines upon public property under a special contract, could not, by a subsequent acceptance of the act, remain thereon after the expiration of the contract. The former company would have had before entering under its contract no opportunity to accept the act, while the latter would, by its conduct, have declined the offer of the act, and would have deliberately expressed its preference for an existence under a special contract.

Can it be successfully contended that the act, after de-

claring upon its face in express terms, that the acceptance of it must be "before" the exercise of any privilege under it, should be construed to authorize a company, first, to reject its terms and to build its lines upon public property under a special contract, and then, upon the expiration of the contract, claim a right to remain on such property, because it has in the meantime filed an acceptance of said act. Such a course of conduct has more the appearance of a fraud than the exercise of a statutory right. . The act was never intended to assist in the perpetration of a fraud. If it were, this court will refuse to adopt a construction which will enable the perpetration of such a fraud, when there is a simple, straightforward construction which will render justice to all.

We submit that even if the appellee could originally have come under the terms of the act, yet it attempted to do so too late to have any effect upon its contract with the appellant.

Whatever right the company may have had to demand and obtain from the city a right of way over and along its streets under said act of Congress, and free of any contract with the city, is a question that is outside of this controversy, as no such demand has ever been made. Certain it is, that the observance by the complainant of its contract will not prevent it from demanding a route under said act, if it comes within its scope. And we submit that it is equally certain that its right to demand a route under the said act, if it has any such right, cannot protect it from being made to abide by the terms of the contract ordinance of June 26, 1884. A right to *some* route does not entitle it to any particular route—especially one which it receives on certain terms and which it agreed to surrender on certain terms. Hence the city should not be enjoined from requiring the complainant to perform the terms of said ordinance, and remove its poles and wires if the repeal ordinance of December 14, 1894, is sufficiently broad in its terms, and is valid.

Nor has the city declared by its ordinances any desire to make the complainant remove its poles and

wires from the streets, other than those in which conduits are required. It is true that the city repealed the ordinance of June 26, 1884. There was no other way by which the city could get free of the privileges granted to the complainant. There was no other way by which the city could make the complainant come under any general ordinance applicable to all telephone companies within the city's limits. In order to keep the city from being overcrowded, the Council passed in July, 1891, an ordinance to require a joint use of poles. (See page 39.) The company refused to act under, or be bound by it. The city had no way by which she could require the appellee to act under it, until she had repealed the contract ordinance of June, 1884. But the city passed on September 10, 1895, an ordinance, a copy of which is filed with the bill as Exhibit "H," which would have protected the complainant as to its poles and wires, except in those streets in which conduits are required, had it seen fit to bring itself within the provisions of this last-mentioned ordinance. But it has refused to do so, because of its objection to the determination of the city to have in its streets as few poles for electrical purposes as possible, and to put light-current wires of different companies together, as far as possible, on the same poles, and heavy-current wires together on other poles. (See answer on page 37.) It cannot be denied that the effort of the city to limit, as far as possible, the number of poles encumbering its streets, is a reasonable and praiseworthy regulation of the use of the streets by electrical companies.

The above feature of the city's conduct in this matter appear in the exhibits filed with the bill, and show that the city was wise in contracting with the complainant for a repeal of the ordinance under which it has heretofore acted. We submit that the reservation of the power to repeal was within the power of the city to regulate the use of its streets, and even if it could not force a telephone company to accept a route under an ordinance containing such a reservation, yet having accepted a contract as to the use of the

city's streets with such a provision in it, such a contract is valid and binding on the complainant.

V.

EFFECT OF THE REPEAL.

We come next to notice the effect of the repeal ordinance of June 26, 1884. The company raises two contentions as to that ordinance.

1st. That the city had no power under the State statute to attach to the ordinance any provision for its repeal.

2d. That if it had such power, yet the repeal does not affect the routes already granted, and only prevents the granting of any new ones.

The basis of the complainant's claim that the city had no power to reserve the right to appeal, is that the State reserved the right to repeal any privilege given by the statute, and because the said statute only authorized any city to consent to the occupation and use of its streets, and did not expressly give any authority to a city to attach any conditions to its consent.

It is impossible to see how the reservation on the part of the State could destroy any right of the city to reserve the right to repeal. The statute shows that it was the intention of the State that the cities should not be disturbed without their respective consents. If it had proposed to ignore the wishes of the cities, and to have at all times its will alone the arbiter, it would have said so, instead of authorizing, so far as it could, the city to *absolutely refuse* to allow any telegraph or telephone company to occupy its streets. While it is true that the reservation on the part of the State applies to any such company, both, so far as it may be within or

without a city, yet it was never intended to take away a right, which was embraced in the right expressly given, viz., to absolutely refuse such companies any right to use its streets. The power of a city, under a clause of that character, to impose conditions, limitations, and restrictions is no longer an open question. It has already been recognized and determined by a decision, first, of the Supreme Court of this State, and then, in the same case, by a decision of the Supreme Court of the United States. (See *Rich., Fred. and Po. R. R. Co.* vs. *City of Richmond*, 26 Gratt., 83, and upon appeal, in 96 U. S., page 521.)

It appears in that case, that the statute of Virginia, authorizing the building of the Richmond, Fredericksburg and Potomac railroad, directed that books of subscription might be opened "for the purpose of making a railroad from some point within the corporation of Richmond, *to be approved by the Common Council*," &c., &c. Under that power the city of Richmond passed an ordinance approving a location asked for by the company, upon condition, "that the corporation of Richmond shall not be considered as hereby parting with any power or chartered privilege, not necessary to the said railroad company for constructing said railroad, and connecting the same with the depot of said company within the limits of the city."

The route of the road ran on Broad street from the western limit to about the centre of the city for about a mile, and on that route the company hauled its cars by steam for about forty years. Then the City Council passed an ordinance forbidding the propelling of cars *by steam* on the said route on Broad street. This last ordinance was upheld by both the Supreme Court of Virginia and the Supreme Court of the United States. In the opinion of the latter court, it is said:

"The power to approve certainly implies the power to reject one location, &c., and this *necessarily carries with it the further power to reserve such governmental control over the*

company in respect to the road, when built," &c. * * * "This the city was willing to do, upon condition that it should not be considered as thereby parting with any power or chartered privilege, not necessary to the company, for constructing its road or connecting it with the depot. The terms were proposed to the company and accepted. * * * By the conditions imposed, these powers were all reserved, except to the extent of permitting the company to construct its roads upon the route designated, and connect it with the depot. All the usual and ordinary powers of the city government over the road when constructed, and over the company in respect to its use, were expressly retained. The company, therefore, occupied Broad street upon the same terms and conditions it would, if the charter had located the route of the road within the city, but in terms subjected the company to the government in respect to the use of the road when constructed."

This case shows that where the authority to grant a franchise is given, that power embraces the lesser power, to attach appropriate conditions and terms to the grant.

We submit that the claim that the city had no power to reserve the right to repeal the ordinance of June 26, 1884, is without merit.

It now remains to see what is the effect and the extent of the repeal. The complainant contends that it had no effect upon the poles and wires already erected and in use, and, if of any effect, could only revoke the power given the Committee on Streets to grant any new or additional route. The city insists that its effect was to repeal the ordinance of June 26, 1884, *in toto*, and revoke absolutely every right and privilege obtained or exercised by the complainant thereunder.

The language of the section reserving the right of repeal is as follows:

"This ordinance may at any time be repealed by the Council of the city of Richmond; such repeal to take effect

twelve months after the ordinance or resolution repealing it becomes a law." Such language admits of no doubt as to what was to be repealed. "This ordinance"—the creation and embodiment of the franchise in all its parts—the life of every privilege therein brought into being—was, what might "at any time be repealed." It did not provide for the repealing of some provision or part of the ordinance. It did not limit the repeal to a revocation of the power given to the Committee on Streets. It declared that the ordinance in its entire scope and effect—"*this ordinance* may at any time be repealed." It embraced in such terms the declaration that every right and privilege, created by the ordinance, could be revoked and obliterated. Such rights and privileges could only exist by reason of the existence of said ordinance. When one ceased to exist, the others also expired.

The subsequent provision, that "such repeal to take effect twelve months" after the repeal ordinance became a law, clearly shows what was meant to be the effect of the repeal ordinance. It surely did not mean that after passage of such repeal the Committee on Streets could continue for twelve months to grant new routes. Yet such is the effect of the construction put by the complainant upon the terms reserving the right to repeal. If, as the complainant contends, the effect of a repeal was merely to prevent the Committee on Streets from granting new routes, then, as the repeal was not to take effect for twelve months, the committee could continue from that time to grant new routes. And if such new routes were also to be beyond reach of the repeal, then the repeal would be virtually useless if the committee should see fit during those twelve months to be very liberal in its granting of new routes. Such a construction, although it is the one for which the complainant contends, is too strained and unreasonable for it to be accepted.

In *Greenwood* vs. *Freight Co.*, 105 U. S., 13, it appears that the Legislature of Massachusetts had by statute created a street railroad company. At the time of the passage of

that special statute there existed also a general statute, reserving the right to amend, alter, or repeal, at the pleasure of the Legislature, every act of incorporation passed by it. The Legislature repealed the special statute, and the question arose, as to what was the effect of that repeal. The Supreme Court held:

"Such an act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it may be repealed? Is it the act of incorporation? Is it the organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the Legislature may adopt the milder course of amending the law, &c., &c. All this may be done at the pleasure of the Legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it," &c., &c.

And again on pages 18 and 19 it says:

"One obvious effect of the repeal of the statute is that it no longer exists. Its life is at end. * * * If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights."

We submit that the above authority is conclusive, and that the repeal revokes any right to continue in use its poles and wires which the complainant may have erected and strung prior to such repeal.

VI.

MUNICIPAL CONTROL.

But even if the complainant's business were interstate commerce, and the complainant were embraced in the terms of the said act of Congress, and the repeal ordinance were ineffective, yet the company would by no means be as free of municipal control as it claims to be in its bill of complaint, and declared in the decree complained of. The bill alleges that the company "under the act of Congress, &c., was and is entitled to maintain and operate its lines through and over the streets and alleys of the city of Richmond, with regard to the consent of the said city," &c. (page 5), and later in its bill of complaint, it alleges in substance that the value of its property is being injured by the passage and threatened enforcement of the two ordinances approved September 10, 1895; copies of which were filed with the bill as exhibits. The prayer of the bill asks "that the ordinances of said city of the 14th of December, 1894, and of the 10th of September, 1895, so far as they undertake to prevent your orator from maintaining and using its lines, poles, and wires over and along the streets and alleys of the city of Richmond from repairing, renewing, and extending its said poles, wires, lines, and routes as its business may require may be declared null and void." The decree declares the right of the company "to put up, renew, replace, and repair its lines, poles and wires" over and along the streets and alleys of the city of Richmond, both those now occupied by the complainant company and those not now so occupied, and enjoined the city "from preventing or interfering with the exercise of the aforesaid rights by the complainant company."

By the eleventh assignment of error the attention of the Circuit Court of Appeals was called to the fact that the said decree was erroneous "because it gives the complainant an

unrestricted right to erect poles anywhere in said city without being subject to the ordinance of the city approved September 10, 1895, filed as Exhibit 'G' with the bill of complaint, or any of its provisions, or any other regulation which may be hereafter ordered by the city authorities." Although the attention of the lower court was called to that error, it remained unchanged, and the city's hands were tied even as to imposing any reasonable regulation. And yet there cannot be any doubt as to the right of the city in that respect. The Supreme Court of the United States has been called upon on more than one occasion to say whether under said act telegraph companies were free from State and municipal control. In *West. Un. Tel. Co.* vs. *Mass.*, 125 U. S., 530-548, it is held that:

"It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such company owed *no obedience to the laws of the State* into which it thus entered, and was under no obligation to pay its fair proposition of the taxes necessary to its support."

In *St. Louis* vs. *West. Un. Tel. Co.*, 148 U. S., 92-100, the court said:

"It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise to be exercised in subordination to public as well as to private rights."

And on page — it says:

"If it is, as these held (*West. Un. Tel. Co.* vs. *Mass.*, 125 U. S.,) simply a permissive statute, and nothing in it which

implies that the permission to extend its lines along roads, not built or owned by the United States, carries with it any exemption from the ordinary burdens of taxation, it may *also* be affirmed that it carries with it no exemption *from the ordinary burdens* which may be cast upon those who would appropriate to their exclusive use any portion of the public highways."

This latter case came again before the court upon a petition for a rehearing (149 U. S., 465.) In its decision upon said petition, the court said:

"If the city gives a right to the use of the streets or public grounds, as it did by Ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used."

And on pages 471-472 it says:

"The determination of the amount to be paid for the use is as much a matter of regulation as determining the place which may be used or the size or height of the poles. * * * But if the city had power to contract with defendant for the use of the streets, it was because it had control over that use. If it can sell the use for a consideration, it can require payment of a consideration for the use; and when counsel say that no question can be made as to the validity of such a contract, do they not concede that the city had such control over the use of the streets as enables it to demand pay therefor?"

See also *Missouri* vs. *Murphy, et al.*, 170 U. S. 78.

The above authorities clearly establish that the telegraph company, which occupies the streets of a city, is subject to all reasonable regulations which the municipality may impose.

It follows that if the said ordinances, filed as Exhibits "G" and "H," contain reasonable regulations, then the lower court should at least have modified its injunction to the extent of requiring the company to conform to such of said regulations as the lower court might deem it to be reasonable. It is within the province of a court of chancery in granting an injunction to impose conditions upon the complainant. Hence, even if the court had power to grant any injunction in this case, it should have only done so upon such conditions set forth in said two ordinances as are reasonable regulations. In looking to see which of the requirements are reasonable, they must be considered as of the time when the complainant refused to proceed or act under them. If the complainant, by his failure to conform, has allowed new circumstances to arise, which would make his compliance now with the said requirements considerably more burdensome, it is his own fault, and the reasonableness of the requirements is not lessened or affected. The complainant would have no one but himself to blame, and could not, because of his own wrong conduct, be relieved from performing acts reasonable when required.

It is true that the Circuit Court of Appeals held that the decision of the Circuit was erroneous in that it did not recognize the right of the city to impose reasonable regulations upon the company for its use of the streets. While the Circuit Court of Appeals declared the existence of that general principle, yet it followed the Circuit Court in holding that the regulations set forth in the two ordinances of September 10, 1895, were void. In that the city respectfully insists that the court erred.

On page 91 of the record will be found the objections which the Court could specify against the two ordinances of September 10, 1895, marked "G" and "H." Against "G" two objections are made. First, that a petition must be filed praying for the privilege of erecting and maintaining poles and wires, where they now are, "in accordance with the conditions of this ordinance and such other con-

ditions as the Council may see fit to impose." Second, that the Council reserves the right to put at any time other restrictions and regulations. Having specified only these two objections, the Court proceeds to condemn the whole ordinance with these words: "And the whole tenor and effect of the ordinance is to put the company absolutely under the control of the city." It was thus that a whole ordinance of some twenty sections was condemned. Strange to say, the company itself had in its bill only made *one* objection to this ordinance, and that was as to the requirement of the petition—and that objection it made upon the false idea that to file said petition it would have to bind itself to remove its poles and wires, if the petition should be refused. It will be seen from a reading of the second section of the ordinance that no such promise was attempted to be extracted. If a party filed a petition, and it was refused, the status of the petitioner was not changed from what it was before he took that step. Yet the lower courts condemned the ordinance *in toto*.

The Circuit Court of Appeals then points out the supposed objectionable features in ordinance "H." It notices that the city proposes to require all companies to put their wires on certain streets in conduits—that the conduits shall be built large enough to hold double the number of wires then on the streets; these conduits to be used by all companies upon contributing a fair share of the expense. The charge for use of street to be $2.00 per wire per mile, until 1900—then the city to charge more, if it should deem proper. The privilege for the conduits to be for a term of fifteen years, at end of which term the city reserves rights to put other conditions. Strange to say, that the company in its bill of complaint nowhere makes any one of these objections. In fact, it points out no objection of any nature whatever to this ordinance "H."

The Court then closes its opinion as follows: "These are some of the conditions now imposed, with the right to impose any others which the Council may see fit. * * *

These conditions, regulations, and restrictions already prescribed by the City Council appear to be stimulated by a desire to oppress and control, perhaps defeat, the existence of the complainant, and so are not the lawful exercise of the police power." Thus these ordinances were declared invalid. We submit that the Court was not called upon to pick out, what it might deem expensive or burdensome features in the ordinances. It should have required the complainant to have specified in its bill the requirements deemed violative of some right. And until the company did so, and showed that it had offered to comply with all proper regulations, it should have refused it any standing in court. In *Missouri, Etc.*, vs. *Murphy, et al.*, 170 U. S., page 78, this Court said:

" If requirements were exacted or duties imposed by the ordinances, which, if enforced, would have impaired the obligations of the company's contract, this did not relieve the company from offering to do those things which it was lawfully bound to do. The exemption of the company from requirements inconsistent with its charter could not operate to relieve it from submitting itself to such police regulations as the city might lawfully impose. And until it had complied, or offered to comply, with regulations to which it was bound to conform, it was not in a position to assert, that its charter rights were invaded, because of other regulations, which, though applicable to other companies, it contended would be invalid if applied to it."

Here the company did not object, because the ordinances were burdensome or unreasonable, but it planted itself upon the claim, that it was above and beyond the power of the city. In its bill of complaint (on page 9) is several sentences of this import. One of them reads as follows: " Your orator further insists that, having accepted the provisions of the act of Congress of 1866, it is entitled to all the rights given thereby, independent of and superior

to the consent of the city of Richmond. One of these rights is the right to 'construct, maintain, and operate its lines' 'over and along' the streets of the said city."

Since the company choose to stand upon that position, we insist that the lower court, as soon as it declared that the company was liable to all reasonable regulations imposed by the city, ought to have refused the company any relief, as it had not alleged that it had offered to conform to all reasonable regulations.

We submit that the terms of said ordinance are not unreasonable. It is easy to understand why the city in 1884 should have reserved the right to repeal the ordinance of June 26, 1884. That ordinance did not undertake to limit or specify the routes to be occupied by the complainant. It authorized the use of "such routes as may be specified and agreed on by a resolution or resolutions of the Committee on Streets from time to time," &c. Having delegated so broad a power it was but the duty of the Council to protect the city by reserving the power of repeal. In the light also of the fact that the invention was at that time comparatively new, with its inconveniences not fully known, it was well to provide for any contingency which might require its removal. Such a contingency has, in the opinion of the city of Richmond, arisen as to a great many of the poles and wires of the complainant. That is shown by the ordinance of the said city, filed with the complainant's bill as Exhibit "H," requiring the removal of poles and wires from overhead in certain streets, and for the construction and use of conduits in the same. The streets specified in the ordinance are the most crowded thoroughfares in that city; and there, therefore, existed a necessity for its passage. This latter ordinance does not declare any desire or intention to drive the complainant from the city. It puts the complainant on the footing with any other telephone company. The bill of complaint so admits. (See page 7.) The second section of this ordinance declares that "the City Council will grant permission to *any* company, corporation, partnership or

individual to place its wires and electrical conductors in conduits under the surface of said streets of the city," &c., &c.

The language of the Court in the case of the *Telegraph Co.* vs. *San Francisco*, 45 Fed. Rep., 593, is appropriate on this point. "The order is general and applicable to all. If it is not enforced as to all, it ought to be, and the chief of police declares his purpose to enforce it, in all cases, that come to his notice. I see no good reason to believe that it was passed for the purpose of discrimination," &c., &c.

The record in this case shows that a company in opposition to the appellee company began operation under the terms of said ordinances "G" and "H" before the issuance of the injunction in this case. (See pages 9 and 69.) The ordinance "H" has not been enforced, because it would have been unfair to have done so, while the appellee company runs unrestrained by either of said ordinances.

The right of a city to require the placing of wires in conduits has been decided favorably by more than one court. Wallace, Judge, so held in *West. Un. Tel. Co.* vs. *Mayor of New York*, 3 Law Repts., Ann't'd, page 449. In the case of *Electric Imp. Co.* vs. *San Francisco*, 45 Fed. Rep., 593, there was discussed an ordinance requiring the removal of wires strung across tops of houses, and the Court said: "Should a raging fire occur, originated by the electric current, or otherwise, these dangerous wires might so obstruct the efforts of the firemen to extinguish it, as to result in the destruction of the entire city. It is certainly competent under the police powers of the State to suppress such dangerous erections in the interest of the common safety of the community." The validity and reasonableness of the New York statutes, requiring the use of underground conduits came under the consideration, also, of the Supreme Court of New York in *A. R. T. Co.* vs. *Hess, et al.*, 125 N. Y., 641. On page 642 that Court said: "It is quite true that the plaintiff could not remove its electrical conductors into the subways without some expense But the same is true of

railroads occupying streets: they cannot change from one style of rail to another, nor from one place in the street to another, nor make a change of grade without a considerable expense; and yet the mere fact that they are subjected to expense is no answer to the right of the public, in pursuance of law, to require them to comply with the prescribed regulations."

Then, commenting on the act of Congress here under discussion, the Court said: "The precise scope and range of operation of these sections within a State are not quite apparent, and cannot be easily defined. But this much, at least, must be true, that under them no telegraph company could interfere with the use of the streets and highways of the State, except under regulations prescribed for the control of all telegraph companies within the State; nor could such companies interfere with streets and highways in the State, so as materially to impair their usefulness as ordinary highways. Nor could these congressional acts deprive the State of its control over its highways and its right to regulate their use under the police power for the public welfare. The laws of Congress are perfectly satisfied by the permission granted to the plaintiff, of which it is perfectly feasible for it to avail itself to place its electrical conductors in the subways constructed beneath the surface of the streets.

An examination of the statutes of New York requiring the placing of electric wires in conduits will show that those statutes were far more stringent than the ordinance "H" here under discussion. (See Statutes of New York, 1885, Chapt. 499, §§ 3, 4, and 8, and Acts 1887, Chapt. 716.)

By ordinance "H" the privilege of building conduits was offered to any company without discrimination. Of course, the city would not allow all companies to build conduits. It would doubtless have granted permission to the first company applying. It would then very probably have required the next company desiring to run wires to enter and use the conduits of the first company, after making satisfactory terms for compensation, or having such com-

pensation determined by arbitration. It was with this view that the capacity of the conduits to be built were required to be double the then needed capacity. The object had in view was a reasonable one. It was to prevent a great nuisance to the public—the frequent tearing up of the streets. We insist that it was the duty of the city to anticipate, and to prevent, as far as possible, such injury to the streets and inconvenience to the general public. It is the duty of a municipal government in granting a franchise to look to the general public interest, and not to the advantage of some particular class. While its requirements should not be unnecessarily burdensome, yet it should make the privileged class bear, as far as possible, all reasonable burdens instead of the general public. Such is wise municipal government.

The right of a city to charge telegraph companies a fair rental for the right to erect each pole upon its highways cannot be denied. (See *St. Louis* vs. *West. Un. Tel. Co.*, 148 U. S., 592-597, and 149 U. S., pages 100-101.) In the latter decision the principle is announced that, "*prima facie*, an ordinance like that is reasonable."

In the case of *Allentown* vs. *West. Un. Tel. Co.*, 148 Pa. St. 117-119, an ordinance was held valid, which imposed a charge of $1.00 per annum on each pole carrying electric wires, and $2.50 per annum on each mile of wire. (See also *Chester* vs. *S. R. and P. Tel. Co.*, 148 Pa. St., page 120; *West. Un. Tel. Co.* vs. *Philadelphia*, 12 Abl. Rep. 144.

The charges imposed by the ordinances here under discussion are still more reasonable. By ordinance "G" the charge is $2.00 per annum per pole, but there is no charge made for the running of the wires carried on said pole. By ordinance "H," requiring the putting of wires on certain thoroughfares into underground conduits the only charge is that of $2.00 per wire per mile.

Thus we submit that when the provisions of these two ordinances, which are complained of, not by the company, but by the lower courts, are examined upon their own merits, or compared with those imposed by cities in other States,

they will be found not to have been passed, as intimated in the opinion of the Circuit Court of Appeals, to "defeat the existence of the complainant." They will be found to be reasonable and not unusual. When it is considered that by the use of the streets the companies are saved the enormous expense of purchasing land for a right of way—that a city frequently has to purchase such right of way—that it has to pay the expenses of improving and repairing its streets—that it furnishes to such companies all necessary police protection—it cannot fairly be said that the requirements and conditions of either of the ordinances are open to any just complaint. On the contrary, it cannot be fairly denied that they come within the principle announced in *Health Department* vs. *Rector*, 145 N. Y. 32-40, viz: they "tend in some appreciable and clear way towards the accomplishment of some one of the purposes which the Legislature has the right to accomplish under the exercise of the police power."

We submit that the facts above stated and the principles above quoted furnish a negative answer to the question put by the said Circuit Court of Appeals—whether "the ordinances of the city of Richmond prescribe regulations which will make the use burdensome and intolerable, and practically impossible."

It may be contended, as was contended in the arguments in the courts below, that section seven of the same ordinance is unreasonable. That section reads:

"The City Council hereby reserves the right to put at any time other restrictions and regulations as to the erection and use of said poles, wires, and other apparatus used in connection with the transmission of electricity, and from time to time require such poles as it may deem proper to be removed, and the wires thereon to be run in conduits upon such terms as the city may deem proper."

It was when noticing this alleged requirement that the Circuit Court of Appeals assumed a position strikingly con-

tradictory of the view it took of the effect of the repeal by the city of the contract ordinance of 1884. It held that the repeal by the city did not have the natural and expected effect of making the company remove its poles and wires from the street. But had the unexpected effect of relieving the company from any restraint of such contract, and planting such poles and wires firmly in the streets under an act of Congress, which the company had at first declined to accept. In other words, that the power *reserved in the contract* to repeal did not amount to anything, because of the act of Congress. Is such a construction of a contract a fair and reasonable one? Is it anything more than evasion? It is keeping the promise to the ear, but breaking it to the hope? Yet when the Court came to notice this alleged requirement of a petition, it used this language:

"Now, it goes without saying that if the complainant, notwithstanding its claim of protection under the act of Congress of 1866, were willing to file a petition to the City Council for the privilege of using its streets and alleys, and in that petition agreed, in consideration of its grant, to abide by any present or future condition, regulation, or restriction the Council may impose, this would be a binding contract, and would control the complainant. * * * * The courts could not review any ordinance to discover if it be within the lawful exercise of the police power, for the complainant would be bound by its contract to obey the ordinance, be it police regulation or not."

We submit that this objection to the ordinance cannot be sound, if the decision of the Court is correct as to the absolute *non-effect* of the repeal. Can the reserved power to repeal amount to nothing, yet the reserved power to amend be dangerous and destructive? In other words, is the lesser power the greater? If the effect of the repeal could be overcome by a declaration of the company that it would henceforth stand under the act of Congress, it would follow

that when an objectionable amendment should be passed, the company would decline thenceforth to exist under the ordinance, and claim the right to remain under the act of Congress. The right to shift its basis would exist in the one case as much as in the other.

We have seen that the right to require wires to be run in conduits is regarded as a reasonable requirement. It is a requirement which is being enforced daily in the large cities of this country. Hence no objection can be sustained as to the specific reservation. Nor can any be sustained as to the more general reservation of power. In the first place, a court is not to *presume* that under such reservation the city will put any unreasonable requirements "as *to the erection and use* of said poles," &c. The reservation is confined to the "erection and use." It indicates that the city desired to reserve power to make such requirements as might be necessary for the safety and comfort of her citizens. Such would be the construction which a court would put upon the language quoted.

"A power reserved to the Legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the Legislature may deem necessary to secure either that object, or any public right." (*New York Co.* vs. *Bristol*, 151 U. S. 556-567.)

Such a reservation was a wise one. Surely it was fairer to have an express reservation of such power, than to silently depend upon that recognized principle so clearly stated in *Chicago Co.* vs. *Nebraska*, 170 U. S. 57-72, that, "when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the Legislature." A principle which had been fully recognized in the previous case of *New York Co.* vs. *Bristol*, 151 U. S. 556. There this Court said:

"The governmental power of self-protection cannot be contracted away." (See page 567.)

A late decision of this court has declared that it is the duty of a municipal government to consider the future when granting a franchise. In *Detroit S. Ry. Co.* vs. *Detroit Rwy. Co.*, 171 U. S., pages 48-53, it said: "There were many reasons which urged to this—reasons which flow from the nature of municipal trust—even from the nature of legislative trust, and those which, without the clearest intention explicitly declared, insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges."

We submit that the same forbiddance lies upon municipal governments as "immutable" privileges. Nor should any court hold that by reasons of those words the city could uselessly hamper or virtually destroy said company's property or rights. Suppose that the city should pass some unjust and unreasonable requirement, the courts would not uphold it. The first requirement for the validity of an ordinance is that it shall be "reasonable." Nor is the objection of any weight that "it fears it might thereby subject itself to requirements from which it insists it was exempted" by the act of Congress. (See *Missouri, Etc.*, vs. *Murphy, supra.*) In that case the Court said:

"We are unable to accede to the contention that * * the Street Commisisoner was obliged to permit it to excavate the streets for that purpose without the assent of the Board of Public Improvements or of the Municipal Assembly or effort to obtain either, on the mere averment of the company that it fears it might thereby subject itself to requirements, from which it insists it was exempted by the terms of its charter."

The said seventh section we submit does not afford any reason why the company should not have recognized

and proceeded in accordance with the terms of the said ordinance as to the joint use of poles of September 10, 1895.

We therefore submit that even if the court were right in holding that the company was protected as to its Richmond exchange by the said act of Congress, yet it should also have held that the said ordinances, made a part of the bill as Exhibits "G" and "H," were binding on the company, and that the company must proceed in accordance with its terms.

We submit, in recapitulation:

1st. That telephone companies do not come within the scope of said act of Congress.

2d. That the business of the appellee is not in any respect or to any extent interstate commerce.

3d. That if the messages sent and received to and from the Western Union Telegraph Company are of such a nature, yet all its other messages are merely local.

4th. That the ordinance of June 26, 1884, was in the nature of a contract, by the terms of which the company must abide, regardless of the nature of its business.

5th. That the ordinance of December 14, 1894, repealed the ordinance of June 26, 1884.

6th. That even if the city should be in error as to all of these positions, yet that the ordinances of September 10, 1895, as to joint use of poles and as to conduits, do not contain any unreasonable provisions.

It is submitted that the said final decree of the Circuit Court is erroneous and should have been reversed, and that the injunction should have been dissolved and the bill dismissed, and that in refusing so to decide the Circuit Court of Appeals erred.

HENRY R. POLLARD,
City Attorney.
C. V. MEREDTH.

In the Supreme Court of the United States.

No. 264.

CITY OF RICHMOND, APPELLANT,

versus

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, APPELLEE.

Reply Brief.

As the opening note for the appellant discusses very fully all the questions affecting the merits of this litigation, this reply note will be confined to discussing the question as to the right of appeal, and then noticing briefly some positions assumed by the appellee.

RIGHT OF APPEAL.

The contention of the appellee is that the appeal should not have been taken from the Circuit Court to the Circuit Court of Appeals, and from the latter court to this court, but should have been taken from said Circuit Court directly to this court. It is alleged that that course should have been taken for three reasons.

1. That the final decree of the Circuit Court involved the construction or application of the Constitution of the United States.

2. That it involved the constitutionality of a law of the United States.

3. That it drew into question a State law claimed to be in contravention of the Constitution of the United States.

We submit that not one of these three alleged reasons existed in fact.

The real and only question presented in this case is whether the Act of Congress applies to the appellee. There are some subordinate questions therein, but they each and all spring out of this main question. We submit that for a cause to involve the "construction or application of the Constitution of the United States," the pleadings must present a direct appeal for protection under some specified clause of the Constitution. If no such appeal is made, but a statute of the United States is relied upon for relief, then the question is not as to the "construction or application of the Constitution," but as to "the constitutionality of a law of the United States."

In this case the bill nowhere claims protection under any specified clause of the Constitution, but specifically alleges that it relies upon the Act of Congress of July 24, 1866, for its rights. Hence under such pleadings the only question of a constitutional nature which can be raised, must be as to the constitutionality of that act. We therefore submit that the record nowhere involves the construction or application of the Constitution, as meant in the act creating the circuit courts of appeals. (26 U. S. Stat., 827, Sec. 5.)

It then remains to ascertain whether the constitutionality of the act so relied upon has been drawn in question. The record contains an opinion of the Circuit Court upon the demurrer filed by the appellant to the appellee's bill of complaint. Upon page 32 of the record it will be seen that this last-named court stated in its opinion that the city (the appellant) "conceded that such act was constitutional; that all the streets of the city of Richmond, which are letter-carrier routes, are post-roads within the meaning of said act, and that under the same a telegraph company can obtain a right of way for its poles and wires

through and along the streets of a city on the decisions of the Supreme Court of the United States."

On page 31 it further stated what was the contention or defence of the appellant. It said: "The insistance is that the complainant is a telephone company, and that said Act of Congress only embraces telegraph companies."

The record also contains the opinion of the Circuit Court of Appeals, and on page 87 that opinion contains this language: "At the bar the appellant declared the constitutionality of the Act of Congress of 1866 was recognized and admitted.

"That all streets which are letter-carrier routes are post-roads of the United States.

"That under the act of 1866 a telegraph company can obtain a right of way for its poles and wires through a city and along its streets against the wish of the municipality."

It cannot reasonably be contended in the face of these facts that the constitutionality of the said act was drawn in question. It is true that we denied that the appellee was embraced in the act. But that denial was as to the *scope* of the act, not as to its *constitutionality*.

On pages 87 and 88 the Circuit Court of Appeals states what were the questions before the court, and which were passed upon.

"First. Does the complainant come within the protection, and is it entitled to the privileges contained in the Act of Congress of 1866?

"Second. If it comes within the provision of that act, how far has it limited and restricted itself by accepting the provisions of the ordinance of the city of Richmond?

"Third. To what extent does the protection of the act of 1866 go? Does it make the company accepting it free of the control of the municipality in which it does business?"

The reply to the appellee's third reason is the same which we have offered to its first reason. The pleadings raise no such question. No clause of the Constitution was specified therein as violated by any State law or city ordinance. The pleadings only raise the question whether the appellee is embraced in the act of 1866, and, if so, whether the city ordinances interfere

with any right therein granted. The constitutionality of the Act of Congress was admitted, and the scope of the act only was in dispute—

1. As to whether it embraces telephone companies.

2. As to what is the extent of the protection afforded against local authorities.

In the light of the above facts, how could the appellant have appealed to this court? We had time and time again admitted the constitutionality of the act. We had again and again claimed that the only questions before the lower courts were as to the scope and applicability of said act of Congress.

According to the decisions of this court, we could not have appealed to it.

In *Cornell* v. *Green*, 163 U. S., 75-80, it was held:

"And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason. An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891."

See, also, *Ansbro* v. *United States*, 159 U. S., 695-7-8; *Borgmeyer, etc.*, v. *Idler*, 159 U. S., 408-414. See, also, *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S., 138.

In *Carey* v. *Houston, etc., Ry.*, 150 U. S., 170-181, it was held:

"In order to hold this appeal maintainable as within the second of the above-named classes (the fourth class in the enumeration of the statute), the construction or application of the Constitution of the United States must be involved as controlling, although on appeal or error all other questions would be open to determination, if inquiry were not rendered unnecessary by the ruling on that arising under the Constitution. *Horner* v. *United States*, 143 U. S., 570."

We also submit that as to the class of cases set forth in section 5 of the act of March 3, 1891, this court has not exclusive juris-

diction as to an appeal. By that section a party is given the right or option to appeal directly to this court, but he is not obliged to pursue that course. He can appeal in such cases to a circuit court of appeals, and from the latter court come here by writ of certiorari. See *McLish* v. *Roff*, 141 U. S., 661-668; *Barting* v. *Bank*, 1 C. C. A., 510.

OBJECTIONS TO THE CITY ORDINANCES ANSWERED.

After raising the question of appeal, which has just been noticed, the appellee makes its "statement of the case on its merits." On pages 8 and 9 of its brief it notices the ordinance of the city approved July 18, 1891. It alleges that there is no proof whatever that that ordinance was passed with the motive of lessening the number of poles on the streets of the city. We reply:

1. That the answer of the appellant, which is on this point responsive to the bill, distinctly alleges that the said ordinance was passed for that purpose. (See pages 36 and 37.) And no proof whatever has been offered to overcome that allegation in the answer.

2. There is no proof whatever offered that the city had at the time of the passage of that ordinance any quarrel or dispute of any kind with the appellee, and hence there is no reason to think that at that time, at least, the city was prompted by any ill will towards the appellee.

3. The ordinance shows upon its face that it is a general ordinance, applicable not to the wires and poles of the appellee alone, but to all wires and poles used for conveying electricity. It is, to say the least, a little removed from wisdom to hold that the city passed such an ordinance to spite the appellee. The ordinance shows upon its face that it could not have been passed with any motive other than alleged in the answer of the appellant. (See page 39.)

The appellee then proceeds to claim that the fact that the city has since then authorized another telephone company to

erect poles and run wires upon and over its streets, " negatives the assertion of the city on this point." We submit that that assertion is hardly satisfactory, either in fullness or frankness. It fails to state that the authority to the other company was not granted about the time of the passage of that ordinance, but was granted more than four years afterwards. It also fails to state that the authority to the second company, known as the Richmond Standard Telephone Company, was granted under the ordinances approved September 10, 1895, filed with the bill of complaint as Exhibits " G " and " H." It fails to state that under said ordinance " G," the second company bound itself to allow a joint use of poles, and would to-day have to allow the appellee company or any other telephone or telegraph company to share its poles, if required by the city so to do. Hence the city, in allowing the second company to occupy its streets, gave proof that it was sincere in desiring to prevent an unnecessary and a burdensome accumulation of poles in its streets, and that it believed that one way to prevent that evil was to require the joint use of poles.

The next allegation as to the facts made by the appellee in its brief is as to the " Cause of Controversy." Under that head it claims that the city repealed the ordinance of June 26, 1884, because the company would not agree to furnish certain 'phones to the city free of charge. The basis of this allegation is the correspondence between the City Engineer and the appellee. There was undoubtedly an effort made by some of the city's officials to obtain certain free 'phones. But there is undisputed evidence in the record that such officials had no power to speak for the City Council. (See statement on page 45.) But the refusal to furnish them was not the cause of the city's repeal of the ordinance of June, 1884. The answer of the city alleges " that it was influenced as much by the said persistent refusal of the complainant to accept the terms of the ordinance of July 18, 1891, as for any other reason to determine to repeal the said ordinance of June 26, 1884." (See page 37.)

The appellee, in his bill of complaint, shows how its refusal was regarded by some of those in authority in the city. It says:

"Threats were, however, made by some of those in authority in the said city that unless your orator submitted to the requirements of this ordinance, that it would be driven from the city, and its business broken up and ruined." (See page 6.) While the city denies that it ever authorized any one to make any threats against the company, these allegations show that one of the causes, if not the principal one, which led the city to pass the repeal ordinance was the refusal of the appellee to agree to the joint use of poles.

It is true that shortly after the said correspondence as to free 'phones was had, the City Council passed the said repeal ordinance. But we submit that this was a coincidence, and not a consequence. As we have shown, the Council had long been desirous of lessening the number of poles by requiring a joint use of them. In this she had been defeated by the appellee, and had been advised by the legal adviser of the city, that, in view of the rights of the appellee under the said ordinance of June 26, 1884, it could not enforce such a requirement against the appellee. (See Bill of Complaint, on page 8.) Hence the City Council knew that it could not put into operation its desire to require the joint use of poles, unless it should repeal the said ordinance of June 26, 1884.

At the time it passed the repeal ordinance, it had in view another scheme to reduce the number of poles—viz., by a system of underground conduits. (See Ex. C. of R., No. 3, on page 73.) That it desired a joint use of such conduits can be seen from the ordinance it subsequently adopted. (See pages 23 to 26.) As it knew that it could not force the appellee to a joint use of poles, until it repealed the ordinance of June, 1884, it is but fair to presume that it knew that it could not force the appellee to a joint use of conduits, except by such repeal. It desired to accomplish the said purposes. It knew that it could not accomplish these purposes without the said repeal. Hence the repeal. The Council also knew that said repeal could not go into effect for twelve months from the date of the passage of such repeal. Hence it passed the repeal ordinance some time before it passed the ordinances "G" and "H." We submit that we have shown

that the Council had two good reasons to induce it to pass said repeal. The record shows that after said repeal the Council proceeded to pass two ordinances to carry out such reasons or objects. Under such circumstances, is it not reasonable to hold that the Council was prompted by the two reasonable and proper purposes which we know it had, and which it subsequently embodied in two important ordinances, than to hold that it was led to pass the repeal ordinance because it could not get a few free 'phones? We submit that the facts in the record show that the appellee is mistaken in its view as to the "Cause of Controversy."

The next question discussed by the appellee in his brief is the "City Ordinances of 1895," being the ordinances marked "G" and "H," as exhibits with its bill of complaint. A comparison of the statement by appellee in his bill of complaint of the evil contained in those ordinances with the description and enumeration of the disasters to flow from them, as set forth in the said brief, will be not only interesting, but suggestive as to the sincerity of the appellee's latest manifestation of fear. In the said bill we find only the following single objection:

"Under one of these ordinances your orator was required (under penalty of ruinous and unreasonable fines) to petition for the privilege of erecting and maintaining poles and wires, where they now are, 'in accordance with the conditions of this ordinance, and such other conditions as the Council may see fit to impose.' And the very first condition to which this company would have to consent, if it made the petition, was, if the company failed to obtain permission asked for, to remove its poles and wires from the streets, and be liable to fines amounting to thousands of dollars for not doing so."

In its brief it devotes a half dozen pages to these ordinances, noticing each of the several sections and pointing out what it deems grave objections to several of them. This enlargement of its views has taken place since the judges of the lower court have commented unfavorably upon the said ordinances. Previous to those opinions the appellee, like the old lady, who

listened to her wrongs, as depicted by her counsel, the great orator Curran, did not know that the woes and wrongs were so numerous and so grievous.

The first objection made in the brief is as to the joint use of poles. We submit that the reasons for requiring a joint use of poles cannot be disputed. The objection is that no appeal is allowed to the courts from the committee or Council's decision. We submit no municipal government could be reasonably carried on, if every ordinance should authorize the persons exercising franchises to appeal to the courts as to every matter of detail. And surely municipal government must not be subverted, however desirable telephone companies may be. As to the comment that the City Engineer is authorized to appoint one of the arbitrators, the ordinance shows that that only happens where the company owning the poles refuses to appoint its arbitrator. Hence it has ample protection.

Then, section 4 is objected to because no appeal is allowed to the decision of the City Engineer as to the size, quality, etc., of the poles. The charter of the city, referred to in the record on pages 73 and 74, shows that the City Engineer is but a creature of the City Council, and hence that his rulings are always subject to reversal by the Council.

The objection to section 7 is the same as that heretofore noticed as made to the section as to the joint use of poles.

This seventh section shows what is meant by the power reserved in the first section. We have already noticed in our opening brief the forced construction put upon it by the appellee. To what we have already said we desire simply to submit the following notice of a decision of the Supreme Court of Pennsylvania upon a similar provision: The city of Philadelphia reserved the right in its ordinance to the Bell Telephone Company of "regulating or in any manner controlling telegraph or telephone companies in the use of the streets for telegraph or telephone purposes." The Supreme Court of Pennsylvania construed that provision as follows:

"Its authority thereafter was only that of regulation as to the use of the streets. * * * As already said, the power

of regulation includes the power to compel the adoption of reasonable and generally accepted devices which increase the safety and convenience of the public." *Com'lth* v. *Warwick*, 185 Pa., 623, 637, 640.

Even at this late day the appellee can find no objection to the other provisions of the ordinance "G." It passes them by with the single remark that, "Then follow other provisions, among them the threatened pole tax."

We have already discussed the reasonableness of said tax. We will merely add the following quotation from the opinion of the Supreme Court of Pennsylvania in the case of *Chester City* v. *W. U. Tel. Co.*, 154 Pa. St., 464-466, where the objection to such a tax was overruled:

"The difficulty is it does not go far enough It refers only to the usual, ordinary, or necessary expenses of municipal officers, of issuing licenses and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe, and properly maintained, and should a citizen be injured in person or property by reason of a neglect of such duty, an action might lie against the city for the consequences of such neglect. It is a mistake, therefore, to measure the reasonableness of the charge by the amount actually expended by the city for a particular year, to the particular purpose specified in the affidavit."

We submit that the thirteenth and fourteenth sections of the ordinance "G" show that the appellant has recognized the very duties and burdens assumed by it, as mentioned in the above quotation.

The appellee then proceeds to offer objection to ordinance "H." It insists that the city has not proved that the removal of poles and overhead wires was intended to apply to the streets in the busier and more crowded portion of the city. Proof can hardly be required of a thing as to which no objection has been made, and as to which a natural presumption immediately and irresistibly arises. Certain it is that the ordinance does not require removal from all the streets, and common sense will teach

that such removal would be ordered from the more crowded thoroughfares, and not from the less frequented streets.

The appellee also denies the power of the city to order the wires to be run underground. We submit that, where the city is empowered to authorize the running of such wires "*along or* over," it would have to be a very narrow construction of municipal power to hold that it would not have the power to require them, as a matter of public safety and convenience, to be run underground. Especially in a case like this, where the city has granted in its charter the powers set forth on pages 44 and 45 of the record. We submit the following authority as conclusive upon this question, as it is the construction put by the Supreme Court of Virginia upon the charter of the city of Richmond: In *Terry* v. *Richmond*, 94 Va., 537-542, that court said: "The right of the Council to determine and designate the route and grade of any railroad to be laid in the city includes the authority to permit the railroad company to run under the street as well as upon it. The servitude is the same in each case."

It will not be denied that one of the cardinal rules for the construction of municipal powers is that a municipality possesses "those necessarily or *fairly* implied in, or incident to, the powers expressly granted." And surely the power to require the wires to be located under the streets is "fairly implied in" the power to authorize them to be run "along *or* over" such streets. When we recognize the liability of a municipality for the proper management and safe condition of its streets, as well as its duty to prevent any erection, which would increase the danger from fires, it is easy to see that the power claimed by the appellant is one "fairly implied in" the one expressly given.

A CARDINAL RULE OF EQUITY VIOLATED.

Upon page 19 of its brief the appellee says that it is ready to comply with "many" of the provisions of the said two ordinances. But it does not then point out, as it had not before that time ever pointed out, which of said provisions it was ready to comply with. This failure was intentional on its part. For

on page 20 it says: " It (the appellee) has not said which of the provisions of the ordinance were valid, and which were not, because there was no need at present to do so. It has merely said, you can't drive this company from your streets; you can't destroy its franchise and property."

It is true that the appellee has never specified heretofore which of the sections of the two ordinances it objects to, except the language as to the first or seventh section of the ordinance " G." It is true that in its bill it has claimed that its rights are " independent of and superior to the consent of the city of Richmond." But it has never before stated its position so defiantly. It virtually says: " You say that I may come upon your streets upon certain specified terms." I reply, " That I am going to stay where I am without agreeing to accept any of those terms. In fact, I refuse to designate which of the terms I object to. I shall simply declare in general terms that ' you can't drive this company from your streets; you can't destroy its franchise and property.' "

We respectfully ask: Has a litigant occupying public property, and asking equity of a court, a right to assume such a position? If it comes into court upon the plea that it is threatened with wrong, must it not specify the nature of the alleged wrong? What remedy can a court give it without accurately knowing of what it complains. Should a court follow the same general language and decree a general protection? It is true that the last sentence of the Circuit Court of Appeals in its opinion in this case did adopt very much that line of action. But we are here complaining of that decree.

We submit that the sentence now under notice from the appellee's brief shows that the whole bill in this case is based upon a wrong theory. If the complainant had any ground for equity interference it should have specified those grounds with such particularity as to inform the court exactly as to what it was willing to do, and as to what it ought not to be made to do. It had no right to come into court upon any general allegation of threatened wrong. As the city has the power to put all reasonable regulations upon the appellee, even if it comes within

the purview of the act of Congress of July 24, 1866, it should have specified which sections of the ordinances "G" and "H" it objected to, and which it deemed reasonable. Not having adopted that course, we submit its bill should have been dismissed, even if it were embraced within the terms of said act.

We submit that the appellee now sees the error it thus committed, and in its brief attempts to relieve itself of the effect of that error. On page 24 it claims that the Circuit Court having this litigation before it, involving the validity of the said two ordinances, enjoined the city from "preventing or interfering with the exercise of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties," and *dismissed the case from the docket*, with the view that hereafter the city could have the cause reinstated, and have the court determine which of the sections in either of the two ordinances were valid and binding. In other words, it is pretended that the Circuit Court perpetually enjoined the city from inflicting any fine or penalty under either of said two ordinances, without passing upon the validity of a single section in either of them. The difficulty of the situation must be very great which would suggest such an escape.

Even if such a peculiar construction can be imposed upon the intelligence of the Judge of the Circuit Court, certain it is that the decision of the Circuit Court of Appeals does not permit it. The latter court noticed many of the sections in the two ordinances, and then declared them invalid. But nowhere is any intimation given that a single line of them is valid and binding. Hence we submit that not only the complainant, but that both of the lower courts have proceeded upon a wrong theory as to the rights of the appellee, even if the company is embraced in the terms of the said act of Congress.

Upon the question of the construction of the act of Congress, we call attention to the case of *Central Un. Tel. Co.* v. *State, etc.*, 118 Ind., pages 194-209. In that case the court said: "Telegraph companies stand upon a different footing, in some respects, from that of telephone companies; they have been

granted some rights and privileges by acts of Congress which cannot be abridged or interfered with."

INTERSTATE COMMERCE.

The appellee, in discussing the connexion between itself and the Western Un. Tel. Company, uses this language: "The transmission of such messages over the wires would be useless without delivery, and their delivery would be impossible without transmission. * * The delivery is the very life of the message."

We reply that without the delivery of freight from the depot to the merchant, the purchase would be useless. Yet, will it be contended that the dray which hauls the freight is a part of the railroad, which is an instrument of interstate commerce? Such a contention will hardly be made. The process of interstate communication stopped when the freight reached the depot—the terminus of its interstate movement. Any means used to deliver it after that must be held to be a mere local "facility." So with the telegram, when it reaches the office in Richmond, it has reached the terminus of its interstate journey, and any means used to deliver it after it has reached such terminus must be a mere local "facility." In the case of the telegram, the cessation of the interstate movement is more marked than in the case of freight. For when the telegram reaches the office of the Western Union Telegraph Company it then changes its being; for it is there written out, and the written message is delivered to the clerk of the telephone company, who speaks it over the telephone wires.

We submit that however the telephone be looked at, it is a mere local "facility."

HENRY R. POLLARD, City Attorney.
C. V. MEREDITH.

No. 264.
(16,827.)
Brief of Fearons & Holladay for Respondent
IN THE

Office Supreme Court U. S.
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Supreme Court of the United States.

October Term, 1898.
Filed Mar. 18, 1899.
No. 264.

THE CITY OF RICHMOND, Petitioner,

vs.

THE SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Brief for Respondent.

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EXPLANATORY PREFACE.

This brief is so arranged under headings, and so analyzed by the index, that the reader may readily turn to the discussion of that topic which for him is the point of interest or of difficulty in the cause, avoiding what he may regard as not requiring elucidation or argument.

Authorities cited are so listed, indexed and spaced, that any case may be read or passed at pleasure.

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Act of Congress of July 24th, 1866, Embraces Local Telephone Companies,

Cases cited under this head:

In re Debs, 158 U. S., 564, ... 85
Pensacola Telgh. Co. *v.* W. U. Tel. Co., 96 U. S., 1., . 81–82
Roberts *v.* Northern Pac. Rd., 158 U. S., 1, . . 84–85

Power of Congress over Post Roads.

Cases cited under this head:

In re Debs, 158 U. S., 564, ... 85
Robert *v.* Northern Pacific Railroad, 158 U. S., 1, . 84–85

Power of Municipality over its Streets Subject to Legislative Control.

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Police Power of City of Richmond.

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Am. Rapid Tel. Co. *v.* Hess, 125 N. Y., 552, . . 98
West Un. Telgh. Co. *v.* Mayor of N. Y., 38 Fed. 555, 98
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West. Un. Telgh. Co. *v.* Pendleton, 122 U. S., 259. . 22
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N. O. Water Works Co. *v.* City of N. O., 164 U. S., 481, 100

(16,827.)

IN THE

Supreme Court of the United States,

October Term, 1898.

No. 264.

THE CITY OF RICHMOND, PETITIONER,

vs.

THE SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Brief for Appellee or Respondent.

JURISDICTION.

In behalf of the Southern Bell Telephone and Telegraph Company we respectfully submit that the appeal from the Circuit Court to the United States Circuit Court of Appeals for the Fourth Circuit was improperly taken; that the city of Richmond could not appeal from the decrees entered by the Circuit Court to the Circuit Court of Appeals, whether the decree of August 23d, 1897, be regarded as interlocutory or final; that if any right of appeal exists from the decree entered by the Circuit Court, such appeal should have been taken directly to

the Supreme Court of the United States and not to the said Circuit Court of Appeals.

The appellee in the Circuit Court of Appeals moved that court to dismiss the appeal and the case, and the motion was overruled by the decree of February 5, 1898, record marginal page 113, which declares that * * "it is now here ordered, adjudged and decreed by this court that the motion made by the appellee at the last term of this court (before the case was heard) to dismiss this appeal and case, because said appeal should have been taken to the Supreme Court of the United States, and not to this court, be, and the same is hereby overruled. * *"

Appeals must be taken from final decrees of the Circuit Courts to the Supreme Court in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States is drawn in question, and in any case in which the law of a State is claimed to be in contravention of the Constitution of the United States. See 26 U. S. Stats., 827, sec. 5.

All of these questions were presented by the appeal at bar. The appellant in its demurrer, marginal pp. 33–34 of the record, raised questions involving the construction and application of the Constitution of the United States as applied to the act of Congress approved July 24th, 1866, and insisted that, if the true construction of this act is opposed to appellant's contention—then, and in that event, the act of July 24th, 1866, is unconstitutional and void. And the appellee in its bill, marginal pp. 10, 11 and 12, insists that, if certain ordinances (which the city of Richmond says should have been construed by the Circuit Court and should be construed by this court) are held to be opposed to its contention—then, and in that event, these ordinances of the city of Richmond would deprive the appellee of vested rights guaranteed to it under the Constitution of the United States, and that said ordinances (if construed and given the meaning and intent placed upon them by the city of Rich-

mond) are in contravention of the Constitution of the United States, and therefore null and void.

The Appellant seems to us to be on the horns of a dilemma with reference to this question of jurisdiction.

The act of July 24, 1866, under which we claim here, is broad enough in its terms to embrace all Telegraph Companies and clearly includes those doing a local as well as those doing an interstate business. If the act is unconstitutional as to local telegraph lines—as seems to be contended by counsel for the City of Richmond, on pp. 47 and 48 of their brief—then they are taking a position which "draws in question the constitutionality" of this Act of Congress, so far as it refers to Telegraph Companies not doing an interstate business. On the other hand, if they admit that its scope is as broad as its language, they can draw no distinction between its application to local Telegraph Companies, and interstate Telegraph Companies. It is too plain for discussion that—if there is any such distinction—it must rest, not on the interpretation of the meaning of the act, but on the power of Congress, under the constitution, to protect one class of Telegraph Companies and not the other. We say Congress can protect and has protected both.

We submit that under a true construction and application of Section 8 of Article 1 of the Constitution of the United States, the Congress had plenary power to establish post-roads and determine the manner of their use for intercommunication and the transmission of intelligence, without reference to State lines, as well as power to regulate commerce with foreign nations and among the several States; that under both of these provisions Congress had power to pass the act of July 24, 1866, and that under a true construction of said act it must be held that the language employed confers upon the Southern Bell Telephone and Telegraph Company the right to "construct, maintain and operate" its lines over and along the post-roads of the United States in the city of Richmond.

We also submit that the Circuit Court was right in basing its decree of August 23, 1897, upon the paramount authority

of the Act of Congress of July 24, 1866, without, at that time, going into a consideration of the State law and city ordinances; but appellant assigned this action of the Circuit Court as error, and asked the Circuit Court of Appeals to construe the Virginia Statute and ordinances of the city of Richmond in a manner which, appellee insists, would render the same repugnant to the Constitution of the United States, and therefore null and void.

In these circumstances we submit that the appeal in this case involved:

1. The construction and application of the Constitution of the United States.

2. A determination of the question whether the act of July 24, 1866, *as applied to the case at bar*, is unconstitutional.

3. A determination of the question whether the ordinances of the city of Richmond, set out in appellee's bill, are in contravention of the Federal Constitution.

STATEMENT OF CASE ON ITS MERITS.

The appellee is a resident of the State of New York; was duly chartered under an act of the Legislature of the State of New York entitled "An Act to Provide for the Incorporation and Regulation of Telegraph Companies." Page 55 of record. Its charter provides for and contemplates the erection and maintenance of its lines not only "within" the State of Virginia, but for the connection of places outside the said State with the lines to be constructed therein.

The appellant, a municipal corporation incorporated and existing in the State of Virginia, under the laws of Virginia, a citizen of said State and having its residence and chief place of business in the Eastern District of Virginia, on the 26th of June, 1884, passed an ordinance, found on page 31 of the record, and which is as follows: (This page and all other pages of the record given in this brief are the marginal pages.)

ORDINANCE

Granting the Right of Way Throughout the City to the Southern Bell Telephone and Telegraph Company.

1. Permission is hereby granted The Southern Bell Telephone and Telegraph Company to erect poles and run suitable wires thereon, for the purpose of telephonic communication throughout the City of Richmond, on the public streets thereof, on such routes as may be specified and agreed on by a resolution or resolutions of the Committee on Streets, from time to time, and upon the conditions and under the provisions of this ordinance.

2. On any route conceded by the Committee on Streets, and accepted by the company, the said company shall, under the direction of the City Engineer, so place its poles and wires as to allow for the use of the said poles by the Fire Alarm and Police Telegraph, in all cases giving the choice of position to the city's wires, wherever it shall be deemed advisable by the Council or the proper committee to extend the Fire Alarm and Police Telegraph over such route.

3. The Telephone Company to furnish telephone exchange service to the city at a special reduction of ten dollars per annum for each municipal station.

4. No shade-trees shall be disturbed, cut or damaged by the said company in the prosecution of the work hereby authorized without the permission of the City Engineer and consent of the owners of property in front of which such trees may stand, first had and obtained; and all work authorized by this ordinance shall be, in every respect, subject to the City Engineer's supervision and control.

5. The ordinance may at any time be repealed by the Council of the City of Richmond; such repeal to take effect twelve months after the ordinance of resolution repealing it becomes a law. (See Exhibit K, page 31 of the record.)

The first section gave permission to the appellee "to erect

poles and run suitable wires thereon for the purpose of telephonic communication throughout the city of Richmond, on the public streets thereof, on such routes as may be specified and agreed on by a resolution or resolutions of the Committee on Streets, from time to time and upon the conditions and under the provisions of this ordinance."

The second section of the ordinance provides that the company shall so place its poles under the direction of the City Engineer on the routes given it by the Committee on Streets, as to allow the Fire Department and Police Telegraph to use them, &c.

The third section provides that the company should furnish the city with 'phones at a reduced rate

The fourth section provides for the protection of shade trees in putting up poles and wires.

And the fifth section provides that "the ordinance may at any time be repealed by the Council of the city of Richmond, such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law."

The company put up its poles and wires along and over the streets of the city of Richmond which were specified by the Street Committee, in accordance with the provisions of this ordinance.

The company, on the 13th of February, 1889, accepted the provisions of the Act of Congress of the United States, approved 24th July, 1866. (See page 14 of the Record.) This act, which will be found in the Revised Statutes of the United States, from sections 5263 and 5269 inclusive, is entitled: "An Act to Aid in the Construction of Telegraph Lines, and to Secure to the Government the Use of the same for Postal, Military and other Purposes." So much thereof as bears on this case is hereafter copied at page 27 of this brief.

From the time of this acceptance the company had and exercised the right "to construct, maintain and operate" its lines * * "over and along" the streets of the city of

Richmond, as well under the provisions of this act as under the ordinances of the city of Richmond, and of the laws of the State of Virginia, and was entitled to all the benefits conferred and subject to all the obligations imposed by the terms of the act. The streets of the city of Richmond are admitted to be post roads (see statement in the bill, page 4 of the Record, not questioned by the answer, and sections 2 and 7 of "agreed facts," page 89 and 90 of the Record). The Act of March 1st, 1884, section 3964, Rev. Stats. U. S. also provides that "all letter carrier routes established in any city or town for the collection or delivery of mail matters are post roads," thus making the streets and alleys of the city of Richmond, which by Article 2nd in agreed facts are admitted to be letter carrier routes established for the collection and delivery of mail matters, page 89 of the Record, post roads.

The plaintiff in the court below alleges in the bill—

1st. That it sends and receives messages between points in and outside of the State of Virginia by connections made with the Western Union Telegraph Office in the city of Richmond; and,

2nd. That this is done, and has been done for years, under agreement still in force.

1st The statement of Mr. Tree, on page 85, shows the close connection between the wires of the appellee and the Western Union Telegraph Company, by which messages are, and have been for many years, interchanged between persons having 'phones in Richmond—so that a message is started by a patron of the appellee in Richmond or some point connected with Richmond by his 'phone, and without anything more on his part transferred by the clerk in the Western Union Office in Richmond from the 'phone wires entering there to the telegraph wires, and thus sent to a point outside the State, and so messages arriving over the Western Union Telegraph line from points outside of the State, are transferred in the said telegraph office in Richmond, by the telegraph clerk there, to the 'phones

of the appellee in said office, and sent at once to their destinations in Richmond and the surrounding country, by the telegraph company's clerk, without the sender or the receiver having anything to do except to send and receive the message. This is, and has been for many years, the way the business is conducted.

Agreement.

2d. By agreement found on page 68 of record (between the American Bell Telephone Company, lessor and licensor, party of the first part, and the appellee, lessee and licensee, party of the second part) it was and is agreed, that the appellee is allowed to do business under the patents and with the instruments of said lessor and licensor. By section 9 of this agreement the appellee was to cause "each of its exchanges to turn over and deliver to the licensor *and such persons as it may from time to time appoint*, all messages for electrical transmission to points outside the territory of such exchange collected by or coming on the wires or within the control of the exchange. * * * It shall keep and furnish an account of such messages transmitted or received," so that the charges provided for by the agreement might be ascertained and properly divided between the appellee and the Western Union Tel. Co, (p. 71 of record). And the Western Union Telegraph Co. was "appointed" as the party which was to transmit these messages. P. 72. Here, then, is the agreement between the appellee and the American Bell Telephone Company, under which it (the appellee) does business, which requires all these messages to be sent and received over the lines of the Western Union Telegraph Company. This is clearly an agreement under which the appellee was and is bound to give and receive their messages to and from the Western Union Telegraph Company. Nor is this all; for by reference to Bell Ex., No. 9, on pp. 79 and 80, and to item 9 of the statement as to evidence on p. 52, it is shown that the Western Union Telegraph Company has received and now holds from the American Bell Telephone Company 'phones in its office in Richmond, under

an agreement which specifies that they are "to be used only for the purpose of receiving and delivering telegraph messages." See p. 79 and 80 of record. So that the Telegraph Company is also bound by this agreement. The appellee agrees with the American Bell Telephone Company to turn over to and receive from the Western Union their messages, and the Western Union agrees to receive, and does receive, from the American Bell 'phones, which it agrees to use only for the purpose of transmitting such messages. And Ex. Bell, No. 10, on p. 80 and 81 of record, shows that the receipts arising from this business for years before the commencement of this litigation up to the time evidence was taken in this case, have been properly ascertained and accounted for in accordance with this agreement. This contract has not expired, and is still in force, and is still being operated under. The papers together, in fact, make a tripartite agreement by which the American Bell Company furnishes 'phones to the Southern Bell and the Western Union Telegraph Company, upon an agreement between all three of them that messages shall be sent and received over the wires of the latter two companies, in certain cases, at certain rates and charges, which agreement was made years ago and has been faithfully kept ever since.

The Southern Bell Company also seems to intend to extend, and to have taken steps looking towards running its lines from Richmond to points outside the State, as by its charter it had a right to do. See p. 89, section 6th of agreed facts, and p. 86 and 87 of the record.

The city of Richmond, some seven years after the company had erected its poles and wires and had been doing business, passed an ordinance on the 18th July, 1891, which undertook to give the Committee on Streets of said city the right to require the said company "to allow any other person or company to place upon its poles * * * any telegraph, telephone, electric light, electric power, electric car wires, or other wires

used in connection with the transmission of electricity." See p. 47 of the record.

The bill charges (p. 7 of record) and the answer admits that the city had no right to thus interfere with the rights of the company, and whilst the answer alleges that its motive in passing this ordinance was to lessen the number of poles on the street, there is no proof whatever of any such motive on the part of the city, or of any necessity for its existence, if the motive did exist. And the fact that it has since then chartered another company and allowed it to put poles on the said streets occupied by the appellee, "to put its poles alongside of, close to the poles of your orator, and has allowed said company to string its wires close to and in many instances touching the poles of your orator," charged in the Bill, not denied, and therefore by section 7 of the agreed facts admitted, negatives the assertion of the city on this point. Certain it is that there is no proof—indeed no claim—on the part of the city that the poles and wires of the company interfered with ordinary travel on the streets.

Cause of Controversy.

Matters rested thus until in 1894, (three years after the abandonment by the city of its effort to make the Appellee allow other companies to use its poles,) when a letter was written by the City Engineer of Richmond, W. E. Cutshaw, making a demand—"requirement" is the word used—on behalf of the Committee on Grounds and Buildings, for thirty stations free of charge. See p. 15 of the record. The company, by its letter found on page 16 of the record, called the attention of the committee to the fact that it paid the city an annual tax of $810, and was furnishing without charge a number of poles for carrying city wires and offered to furnish the 'phones "required" by the committee at half price. The committee immediately replied, through the City Engineer, W. E. Cutshaw, taking no notice of the offer of the company, but increasing the demand for free 'phones to the number of 39, and requiring an answer by 5 o'clock the Monday following. To this,

the company wrote a conciliatory letter on the 5th of November, 1894, showing the unreasonableness of the "requirements of the committee," and evidently suggesting negotiations by which some fair and reasonable understanding might be arrived at. The answer to this was an ordinance approved on the 14th December, 1894, by which the city undertook to repeal and revoke all the rights and privileges given the company, and prepared to drive it from the city. See p. 18 of record. Not only does the tone and temper of the two letters from W. E. Cutshaw, City Engineer, writing on behalf of the committee, communicating their peremptory and *increasing* "requirements" for free 'phones, convey a threat on their faces, but it is stated by Mr. McCluer, Superintendent of the company, in Bill Exhibit, No. 13, on page 84 of record, and not denied, that Mr. Cutshaw and other officers of the city intimated "quite broadly" on several occasions "during the summer and fall of 1894," whilst these demands were being made, that if the company did not give the city free 'phones, that the company would either be subject to a pole tax which would cost considerably more than the free telephones, or that an effort would be made to revoke the municipal franchise." The city promptly ratified and made these threats effectual, by carrying them out, and has undertaken to both revoke the municipal franchise of the company and put on it a heavy pole tax. The prompt and speedy action on its part carrying out the threats made by its officers, one of whom was making the demand and "requirements" for free 'phones in the name of the committee, not only justifies the mild admission of the answer of the city found on pages 43 and 44 of the record, in which it says, "It may be true one of your respondent's committees attempted to *induce* the complainant to furnish it with certain free 'phones," &c., but we most earnestly insist, sustains the position that the controversy in this case arose directly from the demands—or as they are called, "the requirements"—of the committee for free 'phones, and the refusal of the company to comply therewith. The threat of the officers of the city making the demand of the heavy pole tax and of the destruction of the company's busi-

ness (for the repeal of its franchises was intended as such) was almost immediately ratified and adopted and carried out by the city. Thus the controversy arose, and whatever other motives have been alleged by the city, the proof is as we have just stated.

The contention of the city that its harsh action was caused by the refusal of the company to submit to the provisions of the ordinance for the joint use of poles passed and abandoned more than three years before, is not only inconsistent with the long delay and acquiescence of the city after the refusal of the company to accept the provisions of this ordinance, but is also contradicted by the prompt action of the city, immediately following and carrying out the threatening demands and threats for the company's refusal to give the city free 'phones.

City Ordinances of 1895.

Having undertaken to take from the appellee its rights to "construct, maintain and operate" its lines in the city, the city then proceeded, by ordinances approved on September 10, 1895, found on pages 18 to 30 of the record, to "induce" (if we use the word applied by the defendants' answer to the threats of the committee's engineer, by which they sought to get free 'phones for the city) the appellee to abandon its rights (if it had any left) and obtain, or rather apply for a permission *de novo* to occupy the streets of the city under the most burdensome and unreasonable conditions (to all of which the company was to agree), one of which, in section 2 of ordinance on page 18 and 19, actually provided that if the company, failing to obtain such privilege as above required (to keep its poles and wires in the streets), shall neglect or fail to remove such pole or poles and telephone wires supported thereon from the streets or alleys of the city by the 20th December, 1895, and restore the streets to a condition similar to the rest of the street or alley contiguous thereto, the said owner shall be liable to a fine of not less than $5 nor more than $100 for every such pole so remaining in the street or alley, to be imposed by the Police Justice of the city; each day's failure to be a separate offence.

The first and second sections of this ordinance provide as follows:

Be it ordained by the Council of the city of Richmond—

1. That all poles now erected in the streets or alleys of the city of Richmond, for the support of wires used in connection with the transmission of electricity, except such as support wires required by the city ordinances, to be removed and run in conduits, shall hereafter be allowed to remain only upon the terms and conditions hereinafter set forth.

2. No pole now erected for the support of telephone wires shall remain on any street in said city after the 15th day of December, 1895, unless the owner or user of such pole shall first have petitioned for and obtained the privilege of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of this ordinance, and such other conditions as the Council may see fit to impose And if such owner, failing to obtain such privilege as above required, shall neglect or fail to remove such pole or poles and telephone wires supported thereon from the streets or alleys of the city by the 20th day of December, 1895, and restore the street to a condition similar to the rest of the street or alley contiguous thereto, the said owner shall be liable to a fine of not less than five nor more than one hundred dollars for every such pole so remaining in the street or alley; to be imposed by the Police Justice of the city; each day's failure to be a separate offence.

This ordinance required the company to petition for "the privilege of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of this ordinance, and such other conditions as the Council may see fit to impose." In other words, the company must not only abandon all its right which it now holds, whether under the Statutes of the United States of 1866, under the State law of Virginia, or under the ordinances of the city of Richmond of 1884, but must petition for what privileges it wants "in accordance with the conditions of this ordinance

and such other conditions as the Council may see fit to impose."

And the very first condition mentioned in the same section provides that if the Council doesn't see fit to grant the petition of the company, that the company is to remove (and thus destroy) its plant which has cost it thousands of dollars, and be subjected to ruinous fines for failing to do so.

Had the company filed any such petition as this, it would have delivered itself bound hand and foot into the power of the city, whether it granted or refused its application. We have seen what would have been the effect if the city had chosen to refuse, viz: utter and complete destruction of all the company's property in the city, and the ordinance is so drawn as to make the company, by its petition, consent beforehand to this destruction, which it is afterwards under threat, or, if a milder word is preferred, "inducement" of ruinous penalties, to inflict on itself. But suppose the city should choose to grant the prayer of the petition thus offered, what sort of a franchise would the company have?

1st. The Committee on Streets could require the company to allow other persons or companies to put such wires upon its poles as "will not, in the opinion of said committee, unreasonably interfere with the business of the person owning such poles, and upon such terms and conditions as may be agreed upon" between the parties interested, &c. See section 3 of ordinance, page 19 of Record. Observe that the committee is made absolute judge as to how much interference with the company's business is to be allowed. Some interference seems to be expected and intended, but all the restriction imposed on this is that, *in the opinion of the committee*, this should not be unreasonable.

It will be noticed that there is not only no provision for an appeal to the courts, but an express provision, to which the company was to agree beforehand, that the committee was to be the sole arbitrator, and its action in this matter, however unreasonable, however improper, was to be final.

Again, in case the company already having poles and the company or person desiring to use them (who would often be their rivals in business) could not agree on the terms and conditions on which the latter is to use the poles of the former, they shall appoint two arbitrators, who shall select a third arbitrator, and if there is difficulty in selecting the tribunal in this way, which might easily be the case, then the City Engineer—the same gentleman who wrote for the committee the letters "requiring" free 'phones, and tried thereby, as well as by threats to the superintendent of the company, to "induce," as the city's answer terms it, the company to give the free 'phones—is to select the man or men who would have the decision of this vital question.

Section 4 of the ordinance, on page 21, gives the City Engineer absolute and final power to determine the size, quality, character, number, location, condition, appearance and manner of erecting of all poles. No provision is made to control or appeal from his decision, however unreasonable, however arbitrary it may be.

Section 7 gives the City Council the right to put other restrictions and regulations as to the erection of and use of poles, and to require the wires to be put into conduits, "upon such terms as the city may deem proper." No provision is made to supervise or appeal from what the city deems proper in this respect; but the party who, by his petition, has agreed to all these provisions, as by the terms of his petition he would have to do, is to submit absolutely to what the "city may deem proper."

Then follow other provisions, among them the threatened pole tax.

The ordinance providing for the wires to be put in underground conduits was suspended by action of the City Council at the time the bill in this case was filed, until the 15th June, 1897, and whether it is now in force or still further extended we do not know, but it also contains many unreasonable and void provisions.

It is stated in the brief of counsel for the appellant that this

ordinance applied to the streets in the busier and more crowded portion of the city. Not only is there no proof of this in the record, but there is no proof, not even a claim, made on behalf of the city that (using the language of the United States Statute of 1866) "ordinary travel" was "interfered with."

The ordinance found on page 21 directs the poles to be removed and put in conduits under the streets of the city. The city does not provide the conduits, and is not even satisfied with the order given to the company to make conduits for its own wires, but requires it to provide at least one conduit for all the city wires, and more if necessary, free of charge, and to make a conduit 100 per cent. larger than is needed, which is to be used by other companies at such rates as may be agreed on by arbitration, by a board to be composed of three persons, one of whom is to be appointed by the company, one by the new company (desiring to occupy the conduit), and the third to be selected by the first two, and if they disagree, which would be very probable we should say, then he is to be selected by the City Engineer. These provisions appear in sections 2 and 4 of the ordinance.

Section 5 provides that, at the end of fifteen years, the city may put such other restrictions, conditions and charges as it may see fit and shall be lawful, or may order the removal of the wires from the conduits if it chooses.

Section 6 imposes a charge of $2.00 per wire per mile on wires in these conduits.

Section 7 provides for the extension of the conduits as the city may require.

That these ordinances are unreasonable and void is, we submit, clear.

First. We say that the city has no power to put telephone wires under ground. The Statute of the State authorizing telephone companies to occupy the streets of a city uses the words "along or *over*—not under. See section 1287 of the Code of Virginia of 1887, and the case of *Wheat* v. *The City of Alexandria*, 88 Va., 742, decides: The right to dig up streets for the purpose of laying water or gas pipes is a franchise which can only be

granted by the Legislature, or city under legislative anthority, and holds that in that case no such power existed.

The city of Richmond may have power to put pipes and conduits for water and gas under ground, but no power is given it, to put telephone wires there, and the act of the Legislature seems to intend them to be over the streets—not under. See Code of Virginia, 1887, section 1287.

"Sec. 1287. *Right of Telegraph and Telephone Companies to construct and operate lines.*—Every telegraph and every telephone company incorporated by this or any other State, or by the United States, may construct, maintain, and operate its lines along any of the State or county roads or works, and over the waters of the State, and along and parallel to any of the railroads of the State, provided the ordinary use of such roads, works, railroads, and waters be not thereby obstructed; and along or over the streets of any city or town, with the consent of the Council thereof."

SECOND. By these ordinances we insist the company would, if it had to come under them, submit all its rights and franchises to the mercy of the city; it would itself have to go to an enormous expense in providing conduits under the streets, not only for its own wires and the wires of the city, but for the wires of its rivals, who could come in and occupy the conduits by paying a price which might, and probably would, be fixed by a board of three arbitrators, two of whom were appointed by the City Engineer and the rival company; and it is to pay the city $2.00 per wire per mile for the privilege of being allowed to occupy a portion of the conduit when built; but harsh and unreasonable as are these conditions, they may be still harsher and more unreasonable at the end of fifteen years, when, if the city chooses, all remnant of rights of the company—if by that time any are left—may be taken away.

As to the poles which are to be allowed to remain above ground, the company can only be allowed to have their use in the event that the city chooses to allow it, after petition for that purpose shall have been made. The language is: "Un-

less the owner or user of such pole shall first have petitioned for and obtained the privilege of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of this ordinance and such other conditions as the Council may see fit to impose." Were this petition made and granted, not only would the rights of the company be subject to all the provisions and restrictions as to joint use of poles and charges provided for in the ordinance, but would submit itself to "such other conditions as the Council may see fit to impose." And if the city saw fit to reject its application, or if the company does not make it at all, then all its poles and wires must be removed. These ordinances are not only unreasonable, but if they do not actually at the present time destroy absolutely all the rights and property of the defendant company, they clearly put it in the power of the city to do so in the future, and were the company to petition under these ordinances, as the city insists it should do, it would, we submit, have to agree beforehand, in doing so, to surrender every right it now has to the city and become a mere dependent on its favor, which might be withdrawn at any time, even if now granted. This is confessedly the position it would occupy if its application is allowed, after fifteen years had passed, under the fifth section of the ordinance, found at P. 30 of the record.

This, we submit, is not an exercise of the police power of the city to regulate the rights of the company, but a demand by the city for the company's consent to destroy its rights and property whenever it may see fit to do so.

Questions in Issue.

The question in this case is however at present, not how much if any of those ordinances are valid, but whether the city can, as it claims the right to do, drive the company from its streets and destroy its property held under the Constitution and laws of the United States and of the State of Virginia, as well as under the city ordinances, if the company refuses to come in and by the petition provided for it by the ordinance of 1895, abandon all its rights then exist-

ing, and ask for such rights as the city may choose to give, with no certainty that any will be given, and with a certainty that if given, they will be subject not only to the burdensome conditions imposed in the ordinances, but that they are subject to such other conditions as the Council may see fit to impose. Sec. 2 of the Ordinance, p. 19 of record.

The city's position is, not that the company refuses to obey the provisions of the ordinances, many of which it may be ready to comply with, but that it is a trespasser, has no rights at all in its streets, and does not come under these ordinances at all. The city actually refuses to make any reply to applications to replace or repair poles along its routes which have become dangerous (see statement in the bill on page 11).

The bill charges, pages 11 and 12, as follows:

"Your orator further charges that said city claims the right not only to prevent your orator from extending its lines along other streets and alleys in said city, from connecting new subscribers along its routes now used and occupied, from putting up new additional wires along said routes, from replacing old and defective poles and wires along the routes now used by it with new ones, but claims the right to compel your orator to remove said poles and wires now used by it, and cut them down itself, if it should see fit, and though your orator had made application to the proper authorities of said city to designate the character of poles as under the 4th Section of an ordinance of said city, approved 10th Sept., 1895, they are required to do, to be put in the place of poles which are defective and dangerous along its routes, not only was this request not noticed, but the response has been a resolution by the Street Committee passed upon the statement of one of the committee that 'the time had now arrived to take some decisive action to rid the streets of your orator's poles.'"

This statement, not being denied or questioned by the answer, is admitted to be correct under article 7 of the agreed facts, page 90 of the Record; and shows clearly that the city

is taking the ground that the company must, before it can claim any rights or privileges under these ordinances, file its petition, agreeing beforehand to take just such rights as the city chooses to give it, subject to just such future changes or "such other conditions as the Council may see fit to impose," if it chooses to give even this much, and if not, why then the trespasser is at its mercy to be dealt with according to its sovereign will and pleasure. The company, on the other hand, claims that it holds its rights and position in the streets of the city, under the Constitution and Laws of the United States, of the State of Virginia, and under the ordinance of the city of Richmond, and the court having, after careful consideration come to the conclusion that its rights under the Laws and Constitution of the United States entitled it "to construct, maintain and operate" its lines in the city, has, without going into the question of how far its rights were protected by the laws of Virginia, and by the city ordinances, so decreed.

It has not said which of the provisions of the ordinances were valid, and which were not, because there was no need at present to do so. It has merely said, you can't drive this company from your streets, you can't destroy its franchise and property.

When you recognize its right to "construct, maintain and operate," its lines on your streets, it is time enough to decide, what and how much control you have over it. The question —the only question—now is, whether the company has a right to "construct, maintain and operate its lines over and along the streets" of the city.

This is all the Circuit Court decided by its decree of the 23rd of August, 1897, on page 91 of the Record, which reads as follows:

Decree of Circuit Court, August 23, 1897.

"The court without passing on the rights claimed by the complainant company under the laws of Virginia, and the ordinances of the city of Richmond, is of opinion, and doth adjudge, order and decree that the complainant company has,

in accordance with the terms and provisions and under the protection of the Act of Congress of the United States, approved July 24, 1866 (which is an authority paramount and superior to any State law, or city ordinances in conflict therewith), the right 'to construct, maintain and operate its lines over and along,' the streets and alleys of the city of Richmond, both those now occupied by the complainant company, and those not now so occupied, and to put up, renew, replace and repair its lines, poles and wires over and along said streets and alleys, as well as to maintain, construct and operate the same, and to connect its lines with new subscribers along said streets and alleys, and the said city of Richmond, its agents, officers and all others are enjoined and restrained from cutting, removing, or in any way injuring said lines, poles and wires of the complainant company, and from preventing or interfering with the exercise of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising its said rights.

"And the court doth adjudge, order and decree that the defendant do pay to the complainant its costs in this suit incurred, to be taxed by the clerk, and this cause is ordered to be removed from the docket and placed among the ended causes, but with liberty to either party hereto, on ten days' notice to the other, to reinstate this cause on the docket of this court on motion, for the purpose of enforcing and specifically defining, should it become necessary, their respective rights under this decree."

Shortly after this decree was entered the city made an effort to have the court modify and limit its decision so as to limit the right of the company to maintain its lines for the sole purpose of transmitting and receiving messages coming from and going to points outside of the State of Virginia, to and from the city of Richmond, thus making a distinction between local and interstate business, although no such distinction is made

or even attempted to be made by any of the ordinances of the city of Richmond, against which relief is sought in this case; which premature application on the part of the city was properly refused by the court. See page 92 of the record.

The last decree mentioned, entered on the 28th of August, 1897, by the Circuit Court, in which it refused to modify its decree of the 23d August, 1897, *was never appealed from, was therefore not before the Circuit Court of Appeals and is not now before this court for review.*

The decree of the 23d August, 1897, entered by the Circuit Court, was reversed at the instance of the city of Richmond by the Circuit Court of Appeals because, in the opinion of the latter court, it failed sufficiently to recognize the right of the city to exercise proper police power over the company. Page 111 of the record and 113 of the record. It will be thus seen that even if the decree of the Circuit Court could have been complained of by the city on this ground, the decree of the Circuit Court of Appeals, to which it is now objecting, recognizes, in unmistakable terms, the rights of the city in this regard.

Indeed, it is not perceived how the decree of the Circuit Court, even before its reversal and modification, could have interfered with the proper exercise of the police power of the city of Richmond. No claim was ever made by the company, either in its bill or in the presentation of its case in argument before the court, that its rights were superior to the exercise of the police power of the city, except where there was a conflict between the rights given the company under the act of Congress of 1866, under which it claims, and the exercise of said police power. If there is such conflict, then, of course, the act of Congress and the rights under it are paramount. See *W. U. Tel. Co.* v. *Pendleton*, 122 U. S., where this court said, page 259, "The Supreme Court of Indiana placed its decision in support of the statute principally upon the ground that it was the exercise of the police power of the State. Undoubtedly under the reserved powers of the State, which are designated under that somewhat ambiguous term of 'police power,' regulations may be

prescribed by the State for the good order, peace and protection of the community. The subjects upon which the State may act are almost infinite, yet in its regulations in respect to all of them there is this necessary limitation, that the State does not thereby encroach upon the free exercise of the power vested in Congress by the Constitution." See also *W. U. Tel. Co.* v. *Massachusetts*, 125 U. S., in which this court held that whilst the State of Massachusetts had the power to tax the company, it could not, in enforcing this tax, interfere by injunction with the right of the company to carry on its business, because this right was given it under the act of Congress.

The decree of the Circuit Court recognizes this right of the city, and merely says that the company "has in accordance with its terms and provisions and under the protection of the Act of Congress of the United States, approved the 24th of July, 1866 (which is an authority paramount and superior to any State law or ordinance in conflict therewith), the right to construct, maintain, and operate over and along the streets and alleys of the city of Richmond," &c.

We do not well see how the court could have more clearly limited the right which is allowed the company to those given it by the Act of Congress, using, as it does, the very words of the act—"to construct, maintain, and operate its line over and along"—and that portion of the decree which enjoins the city from interfering with the rights of the company is equally guarded; enjoining the city "from preventing or interfering with the exercise of the *aforesaid rights* by the complainant company," and from inflicting fines on said company for exercising its "*said rights.*"

What rights were thus protected from interference of the city of Richmond? Clearly only those rights given and guaranteed to the company by the Act of Congress of 1866, to-wit: the right to construct, maintain, and operate its lines, &c., in accordance with the terms and provisions of that act. Not one word said, or intended to be said, which would free the company from all proper police regulations not in conflict with its rights under said act.

The fact is, that the contest in this case between the city and the company is not, and never has been, as to whether certain provisions of an ordinance were valid or not, in which the court was asked to decide one section to be valid and another not (even if this could be done with reference to these ordinances, which require the company, before claiming any rights under them, to file a petition consenting in advance to all their provisions present and future, and that the city may hereafter impose such regulations and provisions as it sees fit on it); but it was to decide simply whether the company was to be allowed, under the terms of the act of 1866, to construct, maintain, and operate its lines, at all, in the city of Richmond. Whether, in fact, the company could exist there, except by agreeing beforehand to surrender all of its rights, whether under this act or under the State law and city ordinances to the city, and take just such rights as the city now chooses, and may choose in the future, to allow. The city refuses to allow any of the provisions of these ordinances to apply to the company, having even refused to designate the kind of poles to be put in the place of those which have become dangerous and unfit for use, and takes the ground that the company is a mere trespasser on its streets, whose existence has been forfeited, and which is under sentence of death.

That this was, and is, the real controversy in this case, and was, and is, the point decided in favor of the company in both the Circuit Court and the Circuit Court of Appeals, is not only manifest from the whole record, pleadings and proof, but also appears from the closing lines of the decree of the Circuit Court, which provide for the reinstatement of the case on the docket on motion, "for the purpose of enforcing and specifically defining, should it become necessary, their (the parties) respective rights under this decree." This shows that the court thought, as the company earnestly hoped would be the case, that when the question of the right of the company to construct, maintain and operate its lines, in other words, to exist, was settled and established in its favor, that there would be a settlement of the minor questions, such as taxes, &c.,

without further litigation between the parties, but in order to provide for such further controversy, should it arise, the right of either party to apply to the court was reserved. This provision, which we think was clear, in the order of the Circuit Court, is made still more clear and emphatic by the decree (page 113) and the opinion (page 111) of the Circuit Court of Appeals, which provides expressly for "the recognition of a proper exercise of the police power of municipal corporations," and that the use by the company of its poles and wires must "be subject to such regulations and restrictions as may now or may be hereafter imposed by the City Council of Richmond in the proper and lawful exercise of the police power."

Surely here is an express and clear recognition of the right of the city to "the proper and lawful exercise of the police powers;" and unless the city claims the right to exercise its police power, untrammeled by these restrictions, to-wit: to exercise this power, whether lawful and proper or not, it should be satisfied with the decision. The opinion of the Circuit Court of Appeals, found on pages 109 to 112 inclusive, treats of this subject.

All that the Circuit Court of Appeals was called on to decide in this case, all that it could properly decide, and all that it has decided, is that the city can not, by these ordinances, deprive the company of its existence and right to do business in the city, because it declines to consent by signing the petition prescribed, to surrender its rights for the present and future to the untrammeled will of the city, and that the effort on the part of the city to do this is not the proper and legal exercise of its police power. When the city admits the right of the company to its existence here, without its signing such an application abandoning its rights, and undertakes to exercise its police power, it will be the duty of the company, and we doubt not its desire, to obey and conform to all reasonable, proper and lawful ordinances not in conflict with its rights guaranteed to it under the laws of Congress and the State of Virginia, and if it does not do so, the court will compel it.

Some stress is laid by the appellant's brief on the right of

the city to interfere with the local business of the company, as distinguished from its interstate business, which they say is prohibited by the court.

1st. We insist that until the city by some ordinance undertakes to regulate the local business separate and apart from the interstate business, it cannot raise such a question. The ordinances before the court over which the contest here has arisen, and been decided, make no distinction between interstate and local business. The application, therefore, of the city for a modification of the order of the lower court, found on page 92 of the Record, was improper, and asked the court to decide simply a moot question—one not before it,—and which did not arise and could not arise under the ordinances then in force, and it was properly objected to by counsel for the company and properly refused by the Circuit Court.

2nd. We find nothing in the language either of the decree or the opinion of the Circuit Court of Appeals, to indicate that it concurred with the court below in the reasons it gave for refusing to modify this decree in this respect. The decision of the court below was reversed in so far as to make it clear (the Circuit Court of Appeals seeming to think there was doubt about it) that the city was to have a right to exercise proper and lawful police power.

Indeed the order of the Circuit Court, entered on the 28th of August, 1897, page 92 of the Record, which seems so peculiarly objectionable to the appellant, *was not before the Circuit Court of Appeals* at all, never having been appealed from, and is not now before this court.

3rd. But if the point about allowing the city to prohibit the sending of local messages could have been considered and decided by either of the courts below (separately and distinct from the interstate business done by the company), in the absence of any ordinance of the city separating the two, the decree of August 28, 1897, was right. This brings us to the question of the scope and constitutionality of the Act of Congress of 1866. So much of the said act as applies to the case at bar is as follows:

Act of Congress of July 24, 1866.

"An Act to Aid in the Construction of Telegraph Lines, and to Secure to the Government the Use of the same for Postal, Military, and other Purposes.

"Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that any telegraph company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by Act of Congress, and over, under, or across the navigable streams or waters of the United States: *Provided*, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads. * * * *

"Sec. 2. And be it further enacted, that telegraphic communications between the several departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General.

"Sec. 3. And be it further enacted, that the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association, or person: *Provided, however*, that the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

"Sec. 4. And be it further enacted, that before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General, of the restrictions and obligations required by this act."

The Circuit Court rested its opinion and decree of August 23, 1897, upon the paramount authority of this act of Congress, and without at that time passing on the rights claimed by the appellee under the laws of Virginia, and the ordinances of the city of Richmond, decreed in substance that appellee, in accordance with the terms and provisions and under the protection of the act of Congress approved July 24th, 1866, has the right to construct, maintain, and operate its lines over and along the streets and alleys of the city of Richmond, and restrained the city of Richmond from removing or injuring said lines, from interfering with the exercise of the *aforesaid* rights, and from enforcing penalties on appellee for exercising its *said* rights, and removed the cause from its docket, but with liberty to either party thereto on ten days' notice to the other to reinstate the cause on the docket of the court for the purpose of enforcing and specifically defining, should it become necessary, their respective rights under said decree.

The Circuit Court, without passing upon the Virginia Statutes and city ordinances, declared in substance that the appellee could not be absolutely driven from the post roads (streets and alleys) of the city of Richmond. It so framed its decree of August 23, 1897, that the city of Richmond might have a further decree in respect to these matters should it thereafter so desire.

From the decree of the Circuit Court (the full text of which may be found at p. 20 of this brief) an appeal was taken by the City of Richmond to the Circuit Court of Appeals for the Fourth Circuit. The cause was argued at the November Term 1897, and at the February Term 1898—the latter court reversed the decree of the Circuit Court and remanded the cause to the

Circuit Court "with instructions to modify the terms of the injunction therein granted so that it may conform to the principles declared in the opinion of this court."

The Circuit Court of Appeals while recognizing the right of the appellee, under the Act of Congress of July 24th, 1866, to construct, maintain and operate its lines upon the post roads (streets and alleys) of the City of Richmond, deemed it best to recognize at some length in its opinion the police power of the City of Richmond. The full text of its opinion may be found at marginal pages 102 to 112 of the record.

Extracts from Opinion of Circuit Court of Appeals.

At p. 110 the court said:

"The complainant, under the act of Congress, has the right to use these highways. Neither the State, nor any municipality can prevent it. But this use must be subordinate to the rights of the public, must not endanger those rights. And as the municipality is the guardian of the public in this regard, it can establish such lawful provisions as may regulate the use, always, however, avoiding such regulations as will make the use burdensome and intolerable, and so practically impossible. * *

"This being so, the injunction granted by the Circuit Court is too broad in its language and effect. There should have been the recognition of a proper exercise of the police power by the municipal corporation, and the use by the complainant of its poles and lines should have been declared to be subject to such regulations and restrictions as may now or may be hereafter imposed by the City Council of Richmond, in the proper and lawful exercise of the police power.

"The only remaining question is, do the ordinances of the city of Richmond prescribe regulations which will make the use burdensome and intolerable, and practically impossible?"

And after some discussion of the ordinances of the city of Richmond, the court, at page 112, said:

* * * "Now it goes without saying that if the complain-

ant, notwithstanding its claim of protection under the Act of Congress of 1866, were willing to file a petition to the City Council for the privilege of using its streets and alleys, and in that petition agreed, in consideration of its grant, to abide by any present or future condition, regulation or restriction the Council may impose, this would be a binding contract and would control the complainant. *R. R. Co.* v. *Ryan*, 153 U. S., 436. Whatever the rights of the complainant may have been under such a stipulation, it would surrender them and come within the absolute domination of the City Council. The courts could not review any ordinance to discover if it be within the lawful exercise of the police power, for the complainant would be bound by its contract to obey the ordinance, be it a police regulation or not.

"These conditions, regulations and restrictions already prescribed by the City Council appear to be stimulated by a desire to oppress and control, perhaps defeat, the existence of the complainant, and so are not the lawful exercise of the police power.

"Let the case be remanded to the Circuit Court with instructions to modify the terms of the injunction therein granted, so that it may conform to the principles declared in this opinion, the costs of the case to be equally divided between the parties."

We are met at the threshold with the question whether a Telephone Company is a Telegraph Company, and whether Telephone Companies and Telephone Lines come within the protecting power of the Act of Congress of July 24th, 1866. On this point the opinion of the Circuit Court of Appeals, marginal pp. 108 109, is as follows:

Extract from Opinion of Circuit Court of Appeals.

"The act of Congress of 1866, in terms, speaks of telegraph companies. Do these words include telephone companies?

"The telegraph and telephone both communicate messages by means of electricity over wires, for longer or shorter dis-

tances. The telegraph communicates these messages by sound of instruments, the telephone by the human voice usually. Both depend upon electricity for their action. Each is but a form of use—the product and result of the same principle. The names are only used to distinguish the method of communication.

"In England, in the case of *Attorney-General* v. *Edison Telephone Co.*, 6 Q. B. Div., 244, Stephens, J., in a carefully prepared and elaborate discussion, says: 'I do not think it necessary to express any opinion on a controversy which is more scientific than legal, and perhaps more properly metaphysical or relative to the meaning of words than scientific, as it seems to turn upon the nature of identity in relation to sound. It is enough to say that, whatever be the merits of the controversy, it does not appear to us that the fact, if it is a fact, that sound itself is transmitted by the telephone, establishes any material distinction between telephonic and telegraphic communication, as the transmission, if it takes place, is performed by a wire acted on by electricity.'

"In the *Wisconsin Telephone Co.* v. *City of Oshkosh*, 62 Wis., 32, this case was cited with full approval, and the doctrine asserted that, in contemplation of law, a telephone and telegraph company are one and the same. In the case of the *Chesapeake & Potomac Telegraph Co.* v. *B. & O. Telegraph Co.*, 66 Maryland, 410, the court of last resort of that State quote, with approval, the English case above quoted, and say farther: 'It is clear if we take the term telegraph to mean and include any apparatus or adjustment of instruments for transmitting messages or other communications by means of electric currents and signals, that term is comprehensive enough to embrace the telephone.'

"The same doctrine is clearly and fully expressed in *Duke* v. *Central N. J. Telephone Co.*, 53 N. J. Law Reports, 341. The court quotes the language of Bell in his application for a patent, set out in the Telephone Cases 126 U. S., I. He says: 'What I claim is the method or any apparatus for transmitting vocal or other sounds telegraphically as herein described, by

causing electrical undulations similar in form to the vibrations of air accompanying said vocal sounds.'

"And so also Brown, J., now Mr. Justice Brown, in *Cumberland Telephone and Telegraph Co.* v. *United Electric Railway Co.*, 42 Fed. Rep., 273, says: 'We see no reason to doubt the position assumed by the complainant, that a telephone company is a telegraph company.'

"The complainant, therefore, comes within the protection, and is entitled to the privileges of the act of 1866."

Extracts from cases cited by the Circuit Court of Appeals in its opinion, and also from 135 New York, 404, holding that Telephone Companies are Telegraph Companies.

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6 Q. B. D., 244.

Subject: Telephone Co. is Telegraph Co.

In *Attorney General* v. *Edison Telephone Co.*, 6 Queen Bench, Div. 244, Stephen, J., in an elaborate and exhaustive opinion, said:

"We do not think it necessary to express any opinion on a controversy which is more scientific than legal, and perhaps more properly metaphysical or relative to the meaning of words than scientific, as it seems to turn upon the nature of identity in relation to sound. It is enough to say, that whatever may be the merits of the controversy, it does not appear to us that the fact, if it is a fact, that sound itself is transmitted by the telephone, establishes any material distinction between telephonic and telegraphic communication, as the transmission if it takes place, is performed by a wire acted on by electricity."

* * * * * * *

"That this view does no violence to the common use of language is proved, first, by the fact that, in Mr. Edison's own specifiation, the words 'telegraph' and 'telegraphic,' are fre-

quently used in reference to his invention, and that in Webster's Dictionary, published in 1856, an electro-magnetic telegraph is defined (under the head 'Telegraph'), as an instrument or apparatus for communicating words or language to a distance by the use of electricity, and (under the head 'Electro-magnetic telegraph'), as 'an instrument or apparatus which, by means of iron wires conducting the electric fluid, conveys intelligence to any given distance with the velocity of lightning.'"

* * * * * * *

"In this connection we may dispose of one or two minor arguments by which it was attempted to draw a distinction between telephonic messages and telegrams. It was said to be essential to a telegraphic message that it should be sent not direct from party to party, but through the intervention of a messenger or clerk, and also that it should consist of signals having a conventional meaning, and not of actual words spoken. It seems to us impossible to regard these matters as essential to the process. A clerk may be regarded merely as an extra link in a chain of communication, and signals are only imperfect substitutes for words. It would be a strange thing to say that improvements by which a step in a given process can be dispensed with, and by which the process itself may be perfected, destroy the character of the process. To take such a view would be to affirm that imperfections in an instrument are essential parts of it, and that their removal destroys it *"

The American decisions are equally as emphatic.

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62 Wis., 32.

Subject: Telephone Co. is Telegraph Co.

In *The Wisconsin Telephone Co.* v. *City of Oshkosh*, 62 Wisconsin, pp. 32–37, the Supreme Court of Wisconsin said:

"As for the difference in the mode of communication by means of telegraphic and telephonic apparatus, see *Attorney-*

General v. *Edison Telephone Co. of London*, L. R., 6 Q. B., Div. 244. In that case Mr. Stephen, one of the judges of the Exchequer Division of the High Court of Justice, who, unlike most American judges, seems to have sufficient time not only to satisfy his own curiosity, but the curiosity of all the curious, has given a very lengthy and definite discussion of that subject. In that case the court conclude that Edison's telephone was a telegraph, within the meaning of the telegraph acts, although the telephone was not invented nor contemplated when those acts were passed. It is there said, in effect, that the mere 'fact, if it is a fact, that sound itself is transmitted by the telephone, establishes' no 'material distinction between telephonic and telegraphic communication, as the transmission, if it takes place, is performed by a wire acted on by electricity.' It is there further said that, 'of course no one supposes that the Legislature intended to refer specifically to telephones many years before they were invented, but it is highly probable that they would, and it seems to us clear, that they actually did use language embracing future discoveries as to the use of electricity for the purpose of conveying intelligence.' **It is upon this theory of progressive construction that the powers conferred upon Congress to regulate commerce, and to establish post-offices and post-roads, have been held not confined to the instrumentalities of commerce, or of the postal service, known when the constitution was adopted, but keep pace with the progress and developments of the country, and adapt themselves to the new discoveries and inventions which have been brought into requisition since the constitution was adopted, and hence include carriage by steamboats and railways, and the transmission of communications by telegraph. Pensacola Tel. Co. vs. W. U. Tel. Co., 96 U. S., 1.**

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66 Md., 410.

Subject: Telephone Co. is Telegraph Co.

In the case of *Chesapeake & Potomac Telegraph Co.* v. *Balti-*

more & Ohio Telegraph Co., 66 Maryland, 410, the Supreme Court of Maryland said:

"This latter act is supposed to have been passed in order to remove all possible doubt as to the authority, under the general incorporation law, for incorporating telephone companies. **But it is clear, if we take the term 'telegraph' to mean and include any apparatus or adjustment of instruments for transmitting messages or other communications by means of electric currents and signals, that term is comprehensive enough to embrace the telephone.** And that the telephone is so embraced within the definition of the telegraph has been expressly decided in England, after the most careful analysis and comparison of the different instrumentalities, and the manner of using them, in the two systems. *Attorney-General* v. *Edison Telph. Co.*, 6 Q. B. Div. 244.

"Therefore, notwithstanding the appellant was **organized as a telegraph company**, under the general incorporation law, before the passage of the act of 1884, ch. 360, **it was, and still is, fully authorized to do a general telephone business; and, in doing such business, it is subject to the provisions of the general incorporation laws that apply to telegraph companies.**"

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53 N. J. L. Rep., 341.

Subject: Telephone Co. is Telegraph Co.

In *Duke* v. *Central New Jersey Telephone Co.*, 53 New Jersey Law Reports, 341, Reed, Judge, in delivering the opinion of the court, said:

"The substantial identity of these methods of transmitting thought is not a novel view of their character.

"The notion of the discoverer of the newer method seems to have been that it was a new use to which the system of telegraphy could be applied.

"Mr. Bell's specification of his claims in his first petition for a patent is set out in full in the statement of facts prefixed

to the opinions in the telephone cases, 126, U. S., 1. In it he says: ' What I claim is (5) the method or an apparatus for transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations similar in form to the vibrations of air accompanying the said vocal sounds.'

" Judicial sentiment, whenever an occasion has arisen for its expression, has uniformly been in the same direction.

" In the case of *Attorney-General* v. *The Edison Telephone Company of London*, 6 Q. B. D., 244, the court was called upon to consider the relations which the two systems of communication bore to each other, in respect to identity of operation.

" Certain acts passed before the invention of the telephone conferred upon the Postmaster-General of Great Britain the exclusive privilege of transmitting telegrams within the United Kingdoms, and of performing all the incidental service of receiving, collecting or delivering telegrams. There were in the acts certain definitions of what should be included in the words ' telegraph ' and ' telegrams,' but all these definitions were descriptive of a telegraphic service by signaling. The question was whether the telephonic transmission of intelligence by the Edison Telephone Company was an infringement upon the monopoly previously granted to the Postmaster-General.

" In an opinion by Mr. Justice Stephens, the scientific methods and mechanical appliances employed by each were reviewed in an exhaustive opinion. He sums up his observations by saying: ' We are of opinion, then, that fully admitting all that has been or, indeed, can be said as to the novelty and value of the telephonic transmitter and receiver, the whole apparatus, transmitter, wire and receiver, taken together, form a wire used for the purpose of telegraphic communication, with apparatus connected therewith for telegraphic communication.

"Again, he says : ' The great object of the act of 1863, was to give special powers to telegraph companies to enable them to open streets, lay down wires, take land, suspend wires over highways, connect wires, erect posts on the roofs of houses, and do many other things of the same sort. The act was in-

tended to confer powers and to impose duties upom companies established for the purpose of communicating information by the action of electricity upon wires, and absurd consequences would follow if the extent and nature of those powers and duties were made dependent upon the means employed for the purpose of giving the information."

This learned Judge then quotes from the cases above cited, 62 Wis., 32, and 66 Md., 399, to sustain his opinion, and, on p. 348, says:

"No one can read the line of argument by which the conclusions in these cases were reached without perceiving a concensus of judicial opinion that the device introduced by the discovery of the electric transmission of sounds is but a novel method of accomplishing the object for which telegraphs were erected, and that a corporation erected under an act which empowers it to conduct a line of telegraph can conduct it by means of a system, which for philological and scientific distinction is called a telephone.

"In this view I concur.

"The improvements, indeed the revolution in the methods of transacting the business of each of the great corporations, has never given rise to a suspicion that the use of these additional means of accomplishing its corporate purpose was not within the limits of its corporate functions."

In this case the court actually went so far as to allow Telephone Companies to exercise rights of eminent domain, which were given by statute to Telegraph Companies.

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42 Fed. R., 273.

Subject: Telephone Co is Telegraph Co.

In *Cumberland Telephone and Telegraph Co.* v. *United Electric Railway Co.*, 42 Fed. R., 273, Judge Brown, now one of the justices of the U. S. Supreme Court, said: * * *

"We see no reason to doubt the position assumed by the complainant, that a telephone company is a telegraph company, and that, under its right to construct and operate telegraphs, it was empowered to establish a telephone service. *Attorney General* v. *Telephone Co.*, 6 Q. B. Div., 244: *Telephone Co.* v. *City of Oshkosh*, 62 Wis., 3; 21 N. W. Rep., 828."

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135 New York, 393.

Subject: Telephone Co. is Telegraph Co.

In *H. R. T. Co.* v. *W. T. & R. Co.*, 135 New York, 393, the court, at pp. 404–5, said:

"* * * At that time, and for twenty years afterwards, the art of telegraphy, as known and practiced, did not include the transmission of human speech by means of the telephone over wires strung upon poles. But it has been held in other States and countries, and, as we think, rightly, that this form of transmitting messages through the medium of an electric current passing over extended wires, is authorized by a statute for the incorporation of telegraph companies, although when the act was passed such form of communication was unknown. (*Wisconsin Telephone Co.* v. *Oshkosh*, 62 Wis., 32; *Cumberland Telephone & Tel. Co.* v. *United Electric Railway Co.*, 42 Fed. Rep., 273; *Attorney-General* v. *Edison Telephone Co.*, L. R. [6 Q. B. D.], 244.)"

Wherever the question has arisen (whether in England or America), it has been held that Telephone Companies and Telegraph Companies stand upon the same footing. The authorities are unanimous in support of this contention. We have found no decision holding otherwise.

In addition to the decisions of the courts in England and in the United States, which are, we submit, conclusive of the question that telephone and telegraph companies are for all purposes embraced in the act of July 24, 1866—the same, and that the expression in this act—of the words—any telegraph

company includes necessarily telephone companies, we beg the court to notice the following matters bearing on this point:

1st. On page 53 of record, Article 18 of Statement of Evidence, is a statement that the patents used by the appellee are the patents referred to in the telephone cases in 126 U. S. Reports, and copies of these patents and the specifications, drawings, &c., as shown in said 126 United States Reports, from pages 4 to 23 inclusive, are to be considered as evidence in this case. By reference to this book on pages 4 and 5, will be found the following, under the words "Bell's Patent of March 7th, 1876.—A. G. Bell."—"Telegraphy"—and on page 6 the case is headed "Improvement in Telegraphy," and the specifications on the same page described the invention as "Improvement in Telegraphy," and so on throughout the specifications and applications for the patents which the appellee uses—they are spoken of and referred to as "Improvements in Telegraphy" and as "Electric Telegraphy," &c.

2nd. The appellee is chartered under the New York Act of Legislature providing for the incorporation and regulation of telegraph companies, page 55 of record. Its name and official title is "Southern Bell Telephone and *Telegraph* Company." Its lines are spoken of in its charter as the "lines of telegraph of this Association." It thus appears that it was chartered on the 11th of December, 1879, under the Telegraph Laws of New York, was called a telegraph company, and its lines called telegraph lines, and has done its business under this charter in numerous States of the United States ever since.

3rd. Being thus chartered and thus engaged, it was allowed by the Postmaster-General of the United States, Don M. Dickinson, himself an able lawyer, to accept the provisions and come under the protection of the Act of Congress of 24th July, 1866. See pages 59 and 60 of record. We have here then, in addition to the decisions of the courts, the concurrent opinion of the Postoffice Department and of the Patent Office Department of the United States, not only that telephone and telegraph companies are to be considered the same, and that

one is embraced by the other, but the decision of the former department that *this company is entitled to come under the protection of the Act of July 24, 1866.* Nor is this all, for

4th. It is clear from article 6 of the agreement between the Western Union Telegraph Company and the National Bell Telephone Company, made on the 10th of November, 1879, pages 60–61 of the record, that the Western Union Telegraph Company had been engaged in the telephone business, because it is agreed thereby that it should "withdraw from the manufacture, rental and use of telephones," except as provided for in this contract—so that the telegraph company claimed, and was exercising, before 1879, the right under its charter to use the telephone patents and do a telephone business.

The decisions of the courts need nothing to sustain them, but they are abundantly sustained by the charter of the company, by a long, uninterrupted and unquestioned course of business of the company by which it has done a telephone business under a charter gotten under laws providing for the charter of telegraph companies, by the action of the Western Union Telegraph Company in doing a telephone business under its charter, and by the action of both the Patent Office and Postmaster-General's Office of the United States, the last of which was by law charged with the duty of passing on the question of whether this company should be allowed to come under the provisions and protection of the act of 1866.

Surely here is support, and abundant support, if any is needed to sustain the unbroken line of decisions in our favor on this point.

The brief of the appellant, page 28, seems to rely on the definition of the word telephone as given in the contract found on page 61 of the record, article 2, section 1, as showing that telephone and telegraph companies are different kinds of instrumentalities. The language of the contract is, "the word telephone *as used in this contract*, refers to an instrument for electrically transmitting or receiving articulate speech." (Italics

ours). Thus showing, we insist, that the draftsman of the agreement had in his mind the opinion that unless he defined the word telephone as he intended to use it "in this contract," that the broader and more common meaning would be adopted. This rather strengthens than weakens the position of the appellee.

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1. What are the powers of Congress under Article I, Section VIII, of the Constitution of the United States?

2. Did Congress have power and authority to enact the statute approved July 24, 1866, if, according to a true construction of the language employed, it gives the appellee the right to construct, maintain and operate its lines over and along the streets and alleys of the city of Richmond, which are post roads.

3. Does the Act of Congress of July 24, 1866, embrace within its scope Telephone Companies, i. e., the appellee in the case at bar?

THE CHIEF POWERS OF CONGRESS UNDER THE CONSTITUTION OF THE UNITED STATES ARE DERIVED FROM THE EIGHTH SECTION OF ARTICLE ONE OF THAT INSTRUMENT.

Constitution of United States.

Article I, Sec. VIII.

"Section VIII. The Congress shall have power."

* * * * * *

"3. To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes."

* * * * * *

"7. To establish Post Offices and post Roads."

* * * * * *

"18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

1. What are the powers of Congress under Article 1, Section VIII, of the Constitution of the United States.

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4 Wheat., 316.

Subject: Construction and Application of Constitution.

In *McCulloch* v. *Maryland*, 4 Wheaton, p. 316, Chief-Justice Marshall prefaced his opinion by declaring that the Constitution in its most interesting and vital part was to be considered upon questions involving the conflicting powers of the Federal Government and its members, and a decision rendered which might essentially influence the great operations of the government, and his "deep sense of its importance and of the awful responsibility involved in its decision," and then, after tracing the reasons leading to the adoption of the Constitution and the necessity for its existence, and discussing the subject at some length, at p. 415, said:

"To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt, to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation, that we shall be compelled to discard it." * *

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12 Wall., 457

Subject: Construction and Application of Constitution.

In the Legal Tender Cases, 12 Wall., 457, Mr. Justice

Strong, delivering the opinion of the court, pages 532, 533, 534, said:

* * * "We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines. In *Martin* v. *Hunter* it was said: 'The Constitution unavoidably deals in general language. It did not suit the purpose of the people in framing this great charter of our liberties to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution.' And with singular clearness was it said by Chief Justice Marshall in *McCulloch* v. *The State of Maryland*, 'A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which it may be carried into execution, would partake of the prolixity of a political code, and would scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.'"

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110 U. S., 421.

Subject: Construction and Application of Constitution.

In *Juilliard* v. *Greenman*, 110 U. S., 421, Mr. Justice Gray, in delivering the opinion of the court, at pages 439–440, said:

"A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract. The Constitution of the United States, by apt words of designation or general description, marks the outlines of the powers granted to the

national legislature; but it does not undertake, with the precision and detail of a code of laws, to enumerate the subdivisions of those powers, or to specify all the means by which they may be carried into execution.

* * * * * * *

"The section which contains the grant of these and other principal legislative powers concludes by declaring that the Congress shall have power

"'To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.'

"By the settled construction and the only reasonable interpretation of this clause, the words 'necessary and proper' are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously affect it."

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149 U. S., 698.

Subject: Construction and Application of Constitution.

In *Fong Yue Ting* v. *United States*, 149 U. S., 698, Mr. Justice Gray, at pages 712–713, said:

"As long ago said by Chief Justice Marshall, and since constantly maintained by this court: 'The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.'

"'Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.' *McCulloch* v. *Maryland*, 4 Wheat., 316, 421, 423; *Juilliard* v. *Greenman*, 110 U. S., 421, 440, 450; *Ex-parte Yarbrough*, 110 U. S., 651, 658; *In Re Rapier*, 143 U. S., 110, 134; *Logan* v. *United States*, 144 U. S., 263, 283."

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153 U. S., 532.

Subject: Power of Congress.

In *Re Quarles*, 158 U. S., 532, Mr. Justice Gray, at page 535, said:

"The United States are a nation, whose powers of government, legislative, executive and judicial, within the sphere of action confided to it by the Constitution, are supreme and paramount. Every right created by, arising under or dependent upon the Constitution, may be protected and enforced by such means and in such manner as Congress, in the exercise of the co-relative duty of protection or of the legislative powers conferred upon it by the Constitution, may, in its discretion, deem most eligible and best adapted to attain the object. *United States* v. *Logan*, 144 U. S., 293."

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2. Did Congress have power and authority to enact the statute approved July 24, 1866, if, according to a true construction of the language employed, it gives the appellee the right to construct, maintain and operate its lines over and along the streets and alleys of the city of Richmond, which are post roads.

Construction of the Constitution and its application to Act of July 24th, 1866.

In construing and applying the Constitution to the Act of July 24, 1866, and determining the scope, meaning and intent of the language employed, the foregoing rules and principles must be kept in view, as also the reasoning upon which the Supreme Court has based its conclusions.

The plenary power of Congress over post-roads and its right to enact all laws "necessary," "needful," "requisite," "essential," "conducive to,"—(4 Wheat, 316), their use and usefulness is illustrated by the reference of Chief Justice Marshall to this subject, in *McCulloch* v. *Maryland*, where this eminent jurist, in support of the doctrines there announced, said:

"Take, for example, the power 'to establish post offices and post roads.' This power is executed by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post road, from one post office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post office or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post office and a post road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence." * *

"Post offices and post roads are established to facilitate the transmission of intelligence," 96 U. S., 1—, and it is not only the right but the duty of Congress to enact broad laws under which intelligence may be rapidly transmitted over and along post roads established by it, and to employ language authorizing the use of improved means and instrumentalities by which the transmission of intelligence may be aided and promoted. The power of Congress over post roads may be exercised within the territorial limits of any State. "This power, like all others vested in Congress, is complete in itself, may be ex-

ercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."

The argument of convenience pressed by counsel for the appellant in his brief should be addressed to Congress, not the courts. Congress has placed such restrictions upon the use of post roads, under the provisions of the act of July 24, 1866, as seemed to it proper and necessary, and the wisdom and discretion thus exercised by Congress are not open to review. The great Chief Justice, in *Gibbons* v. *Ogden*, speaking of the power of Congress to regulate commerce, said:

"The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments." *Gibbons* v. *Ogden*, 9 Wheat., 1.

The power of Congress over post-roads is found in the same section of the Constitution conferring its power to regulate commerce, and the language quoted from *Gibbons* v. *Ogden* is as applicable to its powers over the former as the latter.

We also submit that the act of July 24, 1866, was enacted by Congress in pursuance of its constitutional power to regulate commerce; that the appellee is engaged in foreign and interstate commerce; that its business is commerce; that it comes within the scope and meaning of that act; and that neither the State of Virginia nor the city of Richmond can deprive it of the rights and privileges conferred by this act of Congress.

In construing this act of Congress we must consider the needs of the country brought about by steam and electricity, the new and improved means and instrumentalities for communication and commerce; the speedy transmission of intelligence; the rapid movement of commodities; the laws of trade and commerce measured and governed by modern thought,

activity and progress; the prosperity and development of the country, and the close and increasing commercial relations of our people, both within and without the States of their residence.

Purpose and Scope of Act of July 24, 1866.

WHY DID CONGRESS ENACT THIS STATUTE?

WHAT ARE ITS PROVISIONS?

WHAT IS ITS SCOPE—ITS TRUE MEANING AND INTENT?

WHAT COMPANIES ARE EMBRACED WITHIN ITS TERMS?

WHAT RIGHTS AND PRIVILEGES DOES IT CONFER?

WHAT RESTRICTIONS AND BURDENS DOES IT IMPOSE?

WHAT PROTECTION WILL BE AFFORDED THOSE ACCEPTING ITS CONDITIONS, AND AGREEING TO SUBMIT TO ITS REQUIREMENTS?

These are some of the questions to be examined and determined.

Why did Congress enact this statute? What purpose had it in view? What did it intend to encourage, aid, assist and promote?

We look first to the title of the act, bearing in mind that the title of an act must be liberally construed, and, like a constitution, is not expected to contain a detail of its sub-divisions and provisions.

The statute in question is entitled, "An Act to Aid in the Construction of Telegraph Lines, and to secure to the Government, the Use of the same for Postal, Military and other Purposes." The title therefore declares that Congress intended to encourage, aid, assist and promote the construction of telegraph lines; and if it intended to aid in such construction, it reasonably follows that it intended to guarantee to those acting under the provisions of the act, the right to maintain and operate these lines after construction. Congress had in view the use of post-roads for commercial intercourse, for business and

social communication, for the transmission of intelligence by means of electricity; it had in view the use of post-roads for the purposes contemplated by the Constitution; it had in view its duty to regulate commerce and establish post-roads according to the meaning and intent of the Constitution; it intended to enact a law "needful," "requisite," "essential," "conducive to,"—commercial intercourse, business and social communication, transmission of intelligence.

The title of the act shows further that Congress contemplated the use of lines constructed, or coming under this act, as a governmental agency for "Postal, Military and other Purposes," the last three words employed in the title being comprehensive enough to embrace all of the purposes for which the Union was formed.

Post Roads.

The title of the act shows also that Congress had postal service prominently in view.

What are the provisions of this act of Congress?

It provides in the first section "that any telegraph company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by Act of Congress, and over, under or across the navigable streams or waters of the United States: Provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads, * * " it being of course understood that the act contains other provisions which need not at this point be mentioned, and that it applies only to companies accepting its conditions.

The language of the act is broad and comprehensive. It would have taxed the learning and ability of a Marshall to find words more apt and sweeping. The act omits notice of

State lines. It undertakes to execute the constitutional power of Congress, without reference to territorial limits. A telegraph company under the provisions of the act may construct, maintain and operate lines of telegraph upon post-roads, wholly within a single State, or partly in one State and partly in another, or in and through several States. This is the natural and reasonable meaning of the language employed.

It was as much the duty of Congress to enact laws for the use of post roads within the limits of a State, as to enact laws for their use where such post roads extended through several States or parts of several States. It is fair to assume that Congress intended to discharge its whole duty. The language employed bears out this contention. The words used are apt words to convey this meaning. The statute provides "that any telegraph company * * shall have the right to construct, maintain and operate lines of telegraph * * over and along any of the military or * * post roads of the United States which have been or may hereafter be declared such by act of Congress. * * *." Mark the language "over and along any of the military or post roads of the United States." This gives a telegraph company the right to select any particular post road. The post roads to be selected are not limited in number or place. One company may run its lines within a single city or county; another through several counties of a single State; another may construct its line through half of the counties of a single State; another partly in one State and partly in another State; another throughout several States; and yet another may construct, maintain and operate its lines through all the States of the Union. The purpose of the act was "to aid in the construction of telegraph lines"—not to aid in the construction of telegraph lines wholly for the purpose of interstate and foreign commerce. It was "to aid in the construction of telegraph lines" for all of the purposes for which Congress has constitutional power "to establish Post Offices and Post Roads."

"There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be

given their natural and ordinary signification." *Pensacola Telgh. Co.* v. *W. U. Telgh. Co.*, 96 U. S., 12.

The fact that the statute gives any telegraph company, coming under its provisions, "the right to construct, maintain and operate lines of telegraph," over and along post roads of the United States, "which have been, or may hereafter be, declared such by act of Congress," is significant. It shows that Congress intended to confer broad privileges in the selection of routes.

The right to construct lines was not confined to post-roads established by Congress prior to July 24, 1866; it conferred also the right to construct lines upon any post-road established by Congress after the passage of the act. What language could have been more apt? What words more comprehensive? The language, "any of the military or post-roads of the United States which have been, or may hereafter be, declared such by act of Congress," covers every post-road then in existence, and every post-road thereafter established, which any telegraph company, then organized or thereafter organized under the laws of any State of this Union, might see fit to use. The act encouraged the construction of telegraph lines in the broadest sense. It not only conferred the rights and privileges specified in the act, upon companies then in existence, but it invited the formation of new companies. The reasonable and natural construction of the language employed, indicates that it intended to encourage the organization of small companies as well as large; that it intended to meet the needs of every locality, every section, every State; to meet the needs of the people for communication and the transmission of intelligence at home as well as abroad; to meet the needs of the citizen within his own State as well as beyond its limits.

The language employed also indicates that Congress intended the act to meet the needs of the general government, both within and beyond the limits of any particular State. The second section of the act is as follows:

"Sec. 2. And be it further enacted that telegraphic communications between the several departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General."

This language includes "telegraphic communications between the several departments of the Government of the United States and their officers and agents," wherever the lines of any particular company may extend, whether within the limits of a single State or within the limits of several States. It requires that such telegraphic communications, "in their transmission over the lines of any of said companies (shall) have priority over all other business." The purpose of the act in this regard was to keep the several departments of the government in close touch with each other; to establish instantaneous communication between the several departments of the government and their officers and agents, wherever the departments and their officers and agents may be located. Why should the act have withheld from the government the power of instantaneous communication with its officers and agents in the city of New York, for example? Why should it have denied to the several departments of the government facilities of communication within the limits of a large city, where several departments are located within its limits?

"The Constitution of the United States and the laws made in pursuance thereof, are the supreme law of the land. Art. VI, par. 2. A law of Congress made in pursuance of the Constitution, suspends or overrides all State statutes with which it is in conflict." *Pensacola Telegraph Co.* v. *W. U. Tel. Co.*, 96 U. S., 1. The wisdom and the discretion of Congress are the sole restraints on which the people can rely to secure them from the abuse of power conferred by the Constitution. "They are the restraints on which the people must often rely solely, in all representative governments." *Gibbons* v. *Ogden*, 9 Wheat., 1.

Upon looking to the Constitution, we find the power of

Congress, "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," and "to establish Post Offices and Post Roads," alongside of its power to exercise functions without which the government could not exist; to exercise the most vital functions of existence. We find in the same section, for example, the power of Congress, to lay and collect Taxes, Duties, Imposts, to pay Debts, and provide for the common defence and general welfare of the United States: to borrow Money on the credit of the United States: to coin money, and regulate the value thereof: to constitute Tribunals inferior to the Supreme Court: to declare War, grant letters of marque and reprisal: to raise and support armies: to provide and maintain a navy, and other powers of scarcely less importance.

Who would question the power of Congress to enact statutes on the subjects listed above? To deny such powers to Congress, would destroy the Union.

The second section of the act not only requires that communications between the several departments of the government and their officers and agents shall have priority in their transmission, but provides that such messages "shall be sent at rates to be annually fixed by the Postmaster-General." Here we have an important privilege reserved by the government, and a burden imposed upon telegraph companies accepting the provisions of the act. Observe in this connection that the Postmaster-General is the officer of the National Government charged with the duty of annually fixing rates under this statute.

The third section of the act provides "that the United States may, at any time after the expiration of five years from the date of the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property and effects of any or all of said companies at an appraised value, to be ascertained by five competent disinterested persons, two of whom shall be selected by the Postmaster-General of the

United States, two by the company interested, and one by the four so previously selected." This provision seems to go far towards demonstrating our contention that the act of July 24, 1866, intended to encourage the formation of telegraph companies for that purpose, and to aid and assist in the construction of lines in every part of the Union, without reference to length of lines and whether such companies confined their lines to a single city or State, or extended them through several States. It indicates that Congress had in view the purchase of such lines for use as a part of the postal system of the United States.

The third section of the act is far-reaching in its provisions, and shows that Congress had clearly before it the importance of placing the National Government in a position to use electricity as a part of its postal system. This subject might be elaborated almost indefinitely. The title of the act, declaring that it is "an act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military or other purposes," when read in connection with the provisions of its third section, providing how such telegraph lines may be taken by the government at an appraised value, speaks with all the emphasis of volumes of argument.

The fourth section of the act is as follows: "And be it further enacted, that before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General, of the restrictions and obligations required by this Act."

Here we have again a reference to the Postmaster-General, and a declaration, in substance, by Congress, that the act in question belongs to that class of subjects coming under the jurisdiction of the Postmaster-General.

Postal Service.

Congress, in the exercise of its constitutional power, has enacted statutes establishing a comprehensive and far-reaching system of postal service.

It has availed itself of new and useful means and instrumentalities to promote this branch of the public service. Under its laws every citizen can have rapid transmission of intelligence, safe carriage of papers, and cheap transportation of light merchandise. The government has also provided a banking department as a part of its postal system, at all important offices, for transferring money from one office to another. It has postoffices not only in cities, but in every village or hamlet throughout the land. The service varies according to the needs of the locality. A service covering every requirement of a rural district would be insufficient to meet the necessities of a commercial city. Means and instrumentalities are used in cities which are not employed in the country.

By reference to sec. 3964 of U. S. Revised Statutes, it will be seen that

"The following are established post roads * * * *: All letter carrier routes established in any city or town for the collection and delivery of mail matters."

So also by the act of March 1, 1884, 23 Stat., 3:

"All public roads and highways, while kept up and maintained as such, are hereby declared to be post routes."

Power to establish post roads carries with the grant power to use post roads, when established, for postal purposes, and this power includes authority to determine what means and instrumentalities shall be employed to facilitate the transmission of intelligence and to regulate these means and instrumentalities in such manner as Congress, in the exercise of its plenary power, may deem likely to promote the efficiency of the service.

Congress has not only responded to its duty of establishing

post roads in cities, but has undertaken the additional duty of collecting and delivering mail matter. Much is expressed by the words—"All letter carrier routes established in any city or town for the collection and delivery of mail matters." Under this and other statutes, letter carriers are appointed and paid by the National Government, who collect and deliver mail matter along the streets of every important city in the Union; who collect and deliver mail at every door. Here we have means and instrumentalities not in use when the Constitution was adopted. Here we have an illustration of the intention of Congress to provide for the transmission of intelligence from door to door along post roads, making no distinction between commercial, professional and social communications. Postal service moves along broad lines.

The telephone had not come into use when the statute of July 24, 1866, was enacted, but the same far-reaching policy which brought this law into existence embraced all improvement and development in the art of communicating intelligence by means of electricity; and the framers of the law employed language which, we submit, clearly included telephone companies, and permitted such companies to avail themselves of the rights, privileges and protection afforded by its provisions.

As hereinbefore stated, this act does not apply to telegraph companies with lines extending into or through two or more States, as contradistinguished from companies whose lines are wholly within the limits of a single State. It applies to telegraph companies, without regard to territorial limits.

The exercise of authority in this form was not accidental. Congress is not hampered in the enactment of laws regulating the postal service. It has power to enact general or special laws. It may have a different postal service in each city. It cannot be presumed that this discretion will be abused. The act in question illustrates its prudence and caution in requiring that every telegraph company availing itself of its provisions shall so construct, maintain and operate its lines as not to interfere with ordinary travel upon post-roads.

The telephone has become as indispensable in cities for local communication as the telegraph for communication between distant points. A city without a telephone, at this day, would be classed with a city having no railroad. The one has become as indispensable as the other. The telephone brings the merchant, the banker, the professional man in touch with the community in which he lives. Prices are quoted over the 'phone, orders are given, contracts made, and business in its various ramifications transacted. The telephone has become a necessity to active, energetic men engaged in any calling or profession in a city, and especially to those who most freely used the postal service for communication and the conduct of business, before the telephone came into general use. It cannot be doubted that the telephone is constantly used as a means of communication where letters were employed before its introduction. It cannot be successfully questioned that it is daily growing in use and usefulness and that business upon the telephone keeps pace with the development and extension of the system. It cannot be fairly denied that it materially aids, assists and relieves the postal service conducted by the government through its post-offices and letter carriers. It serves the purpose which the policy of the government intended to promote when it enacted the statute of July 24, 1866. The telephone is a new and useful means and instrumentality for communication and the transmission of intelligence. It brings the powerful agency of electricity to the door of the citizen, and enables him to instantaneously transmit and receive intelligence, to make contracts which, under old methods, would have necessitated written communications passing through the post-office, and days of delay to accomplish what may now be completed as rapidly as if the parties contracting stood face to face.

These views find support in *Pierce* v. *Drew*, 136 Mass., 75, and *Julia Bldg. Association* v. *Bell Telephone Co.*, 88 Missouri, 258, and other well considered cases. In the latter case the court, at pp. 268, 269, said:

"If a citizen living or doing business on one end of Sixth

street wishes to communicate with a citizen living and doing business on the other end, or at any intermediate point, he is entitled to use the street, either on foot, on horseback, or in a carriage, or other vehicle in bearing his message. The defendants in this case propose to use the street by making the telephone poles and wires the messenger to bear such communications instantaneously and with more dispatch than in any of the above methods, or any other known method of bearing oral communications. Not only would such communications be borne with more dispatch, but, to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horsemen or carriages. If a thousand messages were daily transmitted by means of telephone poles, wires and other appliances used in telephoning, the street through these means would serve the same purpose, which would otherwise require its use either by a thousand footmen, horsemen or carriages to effectuate the same purpose. In this view of it the erection of telephone poles and wires for transmission of oral messages, so far from imposing a new and additional servitude would, to the extent of each message transmitted, relieve the street of a servitude or use by a footman, horseman or carriage."

The language of the act of July 24th, 1866, the policy of the law, and the purpose of aiding, assisting and promoting the postal service and securing telegraph lines, for the use of the Government and its citizens alike, include and embrace the telephone, and we confidently submit that the complainant is upon the streets of the city of Richmond with its poles and wires under the paramount authority of this act of Congress. It is a governmental agency, performing important functions. It has complied with the requirements of the above act, by filing an acceptance of its provisions with the Postmaster General. It must accept from the Government, for service rendered, such compensation as may be fixed by the Postmaster General in his annual schedule of rates. It must sell its lines to the Government when the latter may wish to become the

sole owner of the same. The appellee, therefore, expects, and has a right to expect, protection from the National Government in the conduct of its important functions upon post routes in the city of Richmond, and protection from destruction of its property by the city.

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96 U. S., 1.

Subject: Postal Service—Commerce.

This statute was first construed in the case of *Pensacola Telegraph Co.* v. *West. Union Telegraph Co.*, 96 U. S., 1. Chief Justice Waite, delivering the opinion of the United States Supreme Court, said:

"Congress has power 'To regulate Commerce with foreign Nations and among the several States.' (Const., Art. I, sec. 8, par. 3); and 'to establish post offices and post roads,' (Const., Art. I, sec. 8, par. 7). The Constitution of the United States, and the laws made in pursuance thereof, are the supreme law of the land. Art. VI, par. 2. A law of Congress made in pursuance of the Constitution, suspends or overrides all state statutes with which it is in conflict.

"Since the case of *Gibbons* v. *Ogden*, 9 Wheat., 1, it has never been doubted that commercial intercourse is an element of commerce, which comes within the regulating power of Congress. Postoffices and post roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National Government.

"The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing

vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances As they were entrusted to the General Government for the good of the nation, it is not only the right, but the duty of Congress to see to it that intercourse among the States, and the transmission of intelligence are not obstructed or unnecessarily incumbered by state legislation.

"The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of intercommunication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates, show that more than eighty per cent. of all the messages sent by telegraph, related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

"It is not only important to the people, but to the Government. By means of it, the heads of departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by enquiry, what is transpiring anywhere that affects the interests they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and intercommunication comes within the controlling power of Congress, certainly as against hostile State legislation. * *"

125 U. S., 530.

Subject: Post-Roads—Commerce.

In *West. Union Telegraph Co.* v. *Massachusetts*, 125 U. S., 530, this statute was further construed by the same court. In that case the Commonwealth of Massachusetts sought to enforce the collection of a tax upon the property of the Western Union Telegraph Company, levied under her statutes, and to enjoin the company from further operation of its lines within its territorial limits of the State, until this tax was paid. The telegraph company claimed exemption from taxation on a large part of its line, located over, under or across post-roads, made such by the United States. An injunction was awarded by the lower court, which was dissolved by the appellate tribunal. In delivering the opinion of the court, Mr. Justice Miller said:

"The telegraph company, which is the defendant here, derived its franchise to be a corporation and to exercise the function of telegraphing from the State of New York. It owes its existence, its capacity to contract, its right to sue and be sued and to exercise the business of telegraphy, to the laws of the State under which it is organized. But the privilege of running the lines of its wires 'through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States. * * * and over, under, or across the navigable streams or waters of the United States,' is granted to it by the act of Congress. This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal Government, carries with it any exemption from the ordinary burdens of taxation.

"While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, *or stop the use of them after they were placed there*, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is

liable to be taxed upon its real or personal property as any other person would be. * * *

"The effect of this injunction, if obeyed, is to utterly suspend the business of the telegraph company, and defeat all its operations within the State of Massachusetts. The act of Congress says that the company accepting its provisions 'shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States.' It is found in this case that 2,334.55 miles of the company's lines, out of 2,833.05 on which this tax is assessed, are along and over such post-roads, and of course the injunction prohibits the operation of the defendant's telegraph over these lines, nearly all it has in the State.

"If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done."

Interstate Commerce.

Coming next to a consideration of the rights of the complainant as an instrument of interstate and foreign commerce, and the protection afforded it, as such, under the constitutional and statutory provisions above recited, we invite the attention of the court to the following paragraphs of the complainant's bill, to be found at pages 2 and 3 of the printed record, which are as follows, viz:

"That in the conduct of its business as aforesaid, your orator maintains in the city of Richmond an office or exchange, supplies and instruments connected by wires with a large num- of subscribers and *with the office of the Western Union Telegraph Company in said city*, and that your orator has now in the said city of Richmond a large number of such *subscribers, each and all of whom* may be and many of whom *are connected through said exchange with the office of said Western Union Telegraph Com-*

pany, and may, and many of such subscribers do, transmit through the instruments on their said premises, through said Exchange and to the office of the Western Union Telegraph Company, messages addressed and intended to be sent and which are sent to points in other States, in the District of Columbia, and foreign countries; your said orator having for years received and transmitted such messages in this manner *under agreement still in force;* and it also has subscribers outside of the city of Richmond, whose 'phones connect with the other 'phones of your orator in said city, by and through means of wires and poles of your orator located on and along the streets and alleys of the said city, many of which customers have no ready and convenient access to said Telegraph Company, except through the use of your orator's wires and poles *for the transmission and receipt of telegrams between them and points outside the State of Virginia and use said 'phones, wires and poles of your orator in connection with said Western Union Telegraph Company for that purpose, under and by virtue of an agreement between your orator and said Western Union Telegraph Company for the joint use of the poles and fixtures of said companies in sending and receiving such messages;* and that part of such transmission from the office of your orator's subscribers to and from the office of the Western Union Telegraph Company, of messages addressed and sent by telegraph to and from points outside of the State of Virginia, to the District of Columbia and to foreign countries, is interstate commerce and is commerce between said points outside of the city of Richmond and the city of Richmond and other States and the District of Columbia and foreign countries, and is a necessary part of the business of your orator, and that its said wires in the city of Richmond, and its poles to which they are attached are used for that purpose, and that therefore your orator's business in the city of Richmond is not confined to telephonic messages between different points in said States and in the State of Virginia, and it is the intention and purpose of your orator to continue in the future, as it has in the past, from time to time to extend its business and build its lines still more across and

beyond the city of Richmond and State of Virginia into other countries and States."

The statement of Mr. Tree, on page 85 of the record, sustains this statement as to the manner of conducting their business, and is as follows:

"There is in the office of the Western Union Telegraph Company in Richmond, Va., three sets of 'phones, received from the American Bell Telephone Company, which are now and have been for many years used for receiving and delivering messages from and to subscribers of the Southern Bell Telephone and Telegraph Company, which are sent to and received from points in and out of the State of Virginia and in foreign countries over the wires of the Western Union Telegraph Company and cables between the U. S. and Europe. These 'phones in the Western Union office in Richmond connect with all the 'phones of the Southern Bell Telephone and Telegraph Company used in and connected with its exchange in Richmond, and are operated as follows, to-wit:

"A subscriber of the Southern Bell Telephone and Telegrarh Company who wishes to send a telegram over the Western Union Lines calls up the Western Union office in Richmond through his 'phone; the clerk of the Western Union Telegraph Company at the 'phone in its office receives the message through the 'phone, puts it in writing and hands it to the operator of the Western Union Telegraph Company, who transmits it over the wires of the latter Co. to its destination.

"When a telegram is received from a point outside of Richmond over the wires of the Western Union Telegraph Company to be sent to a subscriber of the Southern Bell Telephone and Telegraph Company, the Western Union Telegraph operator who receives the message puts it in writing and hands it to the 'phone clerk of the latter company, who has charge of one of the 'phones in its office in Richmond, who calls up the person to whom the message is addressed over the 'phone and delivers it to them through the 'phone. Telegrams are thus

delivered to a large number of subscribers of the Southern Bell Telephone and Telegraph Co., located in and outside of the city of Richmond, Va., but only to those subscribers who request delivery of telegrams by telephone. The 'phone clerk in the Western Union office goes on duty at 9 A. M. daily and attends to these 'phones continuously until 6 P. M. At that time until 2 A. M. the said 'phones in the Western Union office are operated by the regular receiving clerk of the Western Union Telegraph Company on the first floor of the office.

"Over 50% of the telegrams thus sent and received through these 'phones are messages to and from points outside of the State of Virginia. A number of telegrams are sent through these 'phones from pay stations of the Southern Bell Telephone and Telegraph Co., in and outside of Richmond, connected with the Richmond Exchange, by persons who are not subscribers of the Southern Bell Telephone and Telegraph Company.

"(Signed) J. B. TREE, *Supt.*

"*Richmond, Va., June 30, '97.*"

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105 U. S., 460.

Subject: Interstate Commerce.

In *West. Union Tel. Co.* v. *Texas*, 105 U. S., 460, Chief Justice Waite, in delivering the opinion of the court, said:

"In *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 96 U. S., 1, this court held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of Congress in respect to their foreign and interstate business. A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to

those engaged to any considerable extent in commercial pursuits."

EVERY LINK IN A LINE EMPLOYED FOR THE PURPOSE OF TRANSMITTING INTELLIGENCE, OR TRANSPORTING PASSENGERS AND FREIGHT, BETWEEN THE SEVERAL STATES OF THE UNION, IS PROTECTED BY ARTICLE I, SECTION 8, OF THE CONSTITUTION OF THE UNITED STATES, AND IS UNDER THE REGULATING POWER OF CONGRESS.

The authorities on this point are numerous and emphatic, but, in view of the extended citations already given, a few only will be noticed under this head, and that as briefly as possible.

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22 Howard, 244

Subject: Interstate Commerce.

In the case of *Foster* v. *Davenport*, 22 Howard, 244, a steamboat was engaged in lightering goods from and to vessels anchored in the lower bay of Mobile and the wharves of the city, and in towing vessels anchored there to and from the city, and in some instances, towing the same beyond the outer bar of the bay into the gulf to the distance of several miles, and the Supreme Court of the United States held that the character of the navigation and business in which this steamboat was employed, could not be distinguished from that of the vessels it towed or unloaded.

Mr. Justice Nelson, in delivering the opinion of the court, said:

"It is quite apparent, from the facts admittted in the case, that this steamboat was employed in aid of vessels engaged in the foreign or coast-wise trade and commerce of the United States, either in the delivery of their cargoes, or in towing the vessels themselves to the port of Mobile. The character of the navigation and business in which it was employed cannot

be distinguished from that in which the vessels it towed or unloaded were engaged. The lightering or towing was but the prolongation of the voyage of the vessels assisted to their port of destination." * *

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10 Wall, 557.

Subject: Interstate Commerce.

The Daniel Ball, 10 Wall., 557, is also an authority. In that case, the steamer Daniel Ball, was engaged in navigating Grand river, in the State of Michigan, between the cities of Grand Rapids and Grand Haven, and in the transportation of merchandise and passengers between these places, without having been inspected or licensed under the laws of the United States; and, to recover the penalty provided for want of such inspection and license, a libel was filed. It was admitted by stipulation of the parties, that some of the goods she shipped at Grand Rapids and carried to Grand Haven, were destined and marked for places in other States than Michigan, and that some of the goods she shipped at Grand Haven came from other States, and were destined for places within the State of Michigan; and it was also admitted that this steamer did not run in connection with or in continuation of any line of steamers or vessels on Lake Michigan, or any line of railway in the State, although there were various lines of steamers and other vessels running from places in other States to Grand Haven carrying merchandise, and a line of railway was running from Detroit which touched at both the cities named.

The owners of the steamer set up as a defence that the Grand river is not a navigable water of the United States, and that *the steamer was engaged solely in domestic trade and commerce, and was not engaged in commerce between two or more States*, or in any trade by reason of which she was subject to the navigation laws of the United States, or was required to be inspected and licensed.

The District Court dismissed the libel. The Circuit Court reversed this decision, and gave a decree for the penalty de-

manded, and, on appeal to the Supreme Court of the United States, the decree of the Circuit Court was affirmed.

In delivering the opinion of the court, Mr. Justice Field said:

* * * "So far as she was employed in transporting goods destined from other States, or goods brought from without the limits of Michigan, and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress." (See also *Railway* v. *Illinois*, 118 U. S., 557, and cases cited.)

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92 U. S., 259.

Subject: Interstate Commerce.

In the case of *Henderson* v. *Mayor of New York*, 92 U. S., 259, 275, Mr. Justice Miller, in delivering the opinion of the court, said:

"The transportation of a passenger from Liverpool to the City of New York is one voyage. It is not completed until the passenger is disembarked at the pier in the latter city. A law or a rule emanating from any lawful authority, which prescribes terms or conditions on which alone the vessel can discharge its passengers, is a regulation of commerce; and, in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations."

118 U. S., 572.

Subject: Interstate Commerce.

The language of Mr. Justice Miller, in *Wabash Railway* v. *Illinois*, 118 U. S., 572, is strikingly apposite. In that case this eminent jurist said:

"It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the States might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to Congress the power to regulate commerce among the States and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. (*Cook* v. *Pennsylvania*, 97 U. S., 566, 574; *Brown* v. *Maryland*, 12 Wheat. 419, 446.) And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce."

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136 U. S., 104.

Subject: Interstate Commerce.

The extent to which the regulating power of Congress has been carried is even more strikingly illustrated in *McCall* v. *California*, 136 U. S., 104–111. In that case the court held that an agency of a line of railroad between Chicago and New York, established in San Francisco for the purpose of inducing passengers going from San Francisco to New York to take that line at Chicago, but not engaged in selling tickets for the route, or receiving or paying out money on account of it, was

an agency engaged in interstate commerce, and that a license tax imposed upon the agent for the privilege of doing business in San Francisco was a tax upon interstate commerce, and therefore unconstitutional.

Mr. Justice Lamar, in reversing the judgment of the Superior Court of San Francisco, at p. 111, said:

"It is further said that the soliciting of passengers in California for a railroad running from Chicago to New York, if connected with interstate commerce at all, is so very remotely connected with it that the hindrance to the business of the plaintiff in error caused by the tax could not directly affect the commerce of the road, because his business was not essential to such commerce. The reply to this proposition is, that the essentiality of the business of the plaintiff in error to the commerce of the road he represented is not the test as to whether that business was a part of interstate commerce. It may readily be admitted, without prejudicing his defence, that the road would continue to carry passengers between Chicago and New York even if the agent had been prohibited altogether from pursuing his business in California. The test is—was this business a part of the commerce of the road? Did it assist, or was it carried on with the purpose to assist, in increasing the amount of passenger traffic on the road? If it did, the power to tax it involves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent."

And this learned judge, on page 108, quotes from Pomeroy as follows:

"Pomeroy, in his work on 'Constitutional Law,' section 378, referring to the signification of the word 'commerce,' says: 'It includes the fact of intercourse and of traffic and the subject matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the means, instruments, and places by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places and by and with these means. The subject-

matter of intercourse or traffic may be either things, goods, chattels, merchandise, or persons. All these may, therefore, be regulated.'"

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136 U. S., 118.

Subject: Interstate Commerce.

The exclusive power of Congress over this subject is aptly illustrated in *Railway Co. v. Penn.*, 136 U. S., 118. In that case Mr. Justice Lamar said:

"The question before us is thus narrowed to the two following inquiries: (1) Was the business of this company in the State of Pennsylvania interstate commerce? (2) If so, was the tax assessed against it for keeping an office in Philadelphia, for the use of its officers, stockholders, agents and employees, a tax upon such business? We have no difficulty in answering the first of these inquiries in the affirmative. Although the findings of fact are somewhat meagre on this question—much more so, indeed, than the undisputed evidence in the case warranted—enough is stated in the second paragraph of the aforesaid finding to show that the company is engaged in interstate commerce in the State. It is there said in substance: By virtue of its connections and certain traffic contracts with other railroads, the Norfolk and Western Railroad Company 'has become a link in a through line of road, over which, as part of the business thereof, freight and passengers are carried into and out of this Commonwealth.' That is to say, the business of the through line of railroad, of which the plaintiff in error forms a part, or in which it is a link, consists, in a measure, of carrying passengers and freight into Pennsylvania from other States, and out of that State into other States. It certainly requires no citation of authorities to demonstrate that such business—that is, the business of this through line of railroad—is Interstate Commerce. That being true, it logically follows that any one of the roads forming a part of, or constituting a link in, that through line is engaged in interstate commerce, since the business of each one of those roads

serves to increase the volume of business done by that through line."

The proof in this case, it is respectfully submitted, brings the case at bar clearly and fully within the principles announced in each of the foregoing opinions. The case of *Railroad Co.* v. *Penna.*, 136 U. S., 118, had a traffic feature strikingly like the agreement between the Western Union Telegraph Company, the American Bell Company, and the appellee, herein before referred to. Independently of this agreement, which has existed for years and is still in force, and under which the appellee and the Western Union Telegraph Company receive and transmit telephone communications from and to other States, the District of Columbia and foreign nations, the case at bar seems to be plainly and absolutely covered by the foregoing decisions; but, with that agreement in force, it is, we think, impossible to escape the conclusion that the appellee's business comes within the regulating power of Congress, and that it cannot lawfully be disturbed in the discharge of its functions by the city of Richmond, or be driven from the streets of the city, or have its property substantially destroyed, as set out in the bill.

If it is impossible to distinguish between the business of a lighter engaged in towing, loading and unloading vessels, from the business of the vessel it towed or unloaded—is it not equally impossible to distinguish between that part of the transmission of a telegraphic dispatch from the city of New York, for example, passing over the lines of the Western Union Telegraph Co. to Richmond, and that part of its transmission passing over the lines of the appellee in the city of Richmond, before it finally reaches and is received, through his own telephone on his own premises, by appellee's subscriber to whom it is addressed in said city of Richmond? If towing, loading and unloading a vessel in Mobile Bay was but a prolongation of the voyage of the vessel assisted, is not that part of the transmission of the New York message which is communicated by means of electricity from the office of the Western Union Telegraph Com-

pany to appellee's subscriber, on his own premises, also a prolongation of the voyage of the telegram—*especially since both of these companies are public servants engaged in the transmission of intelligence which is an indispensable and increasingly important part of Interstate Commerce?* The line of reasoning which leads to the protection of the lighter necessarily brings the means and instrumentalities of appellee upon the streets of Richmond, for the transmission of intelligence, under the regulating power of Congress.

In the case of "The Daniel Ball," cited above, the steamer ran wholly within the State of Michigan and was not run in connection with or in continuation of any other line leading to or from other States; and yet the court held that it was engaged in Interstate Commerce, so far as it carried goods, having either their point of shipment or destination in other States. If the transportation of goods under these circumstances comes within the regulating power of Congress, it seems to be plain that the transmission of Foreign or Interstate telegrams over the lines of appellee in the city of Richmond, to and from its subscribers, as set out in its bill, comes within the same regulating power. That part of the transmission of a Foreign or Interstate message passing over the lines of the appellee, is as much a part of the voyage of the telegram as that part of its transmission passing over the lines of the telegraph company. The fact that several different agencies are employed in its transmission in no respect affects the character of the transmission. To the extent in which each means and instrumentality acts, in that transmission, it is subject to the regulating power of Congress, under the interstate commerce clause.

The language of Mr. Justice Field, in the Daniel Ball, 10 Wall., is especially apposite, when the case at bar is considered, without the agreement between the West. Union Telegraph Co. and the appellee. On page 565, this great Judge said :

* * "So far as she was employed in transporting goods destined for other States, or goods brought from with-

out the limits of Michigan and destined to places within that State, she was engaged in Commerce between the States, and however limited that Commerce may have been, she was, so far as it went, subject to the legisiation of Congress. * *

* * The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress."

And the language of Mr. Justice Lamar in *Railroad Co.* v. *Penna.*, 136 U. S., 114, is even more strikingly apposite, when the case at bar is considered with reference to the agreement for years existing and still in force between the West. Union Telegraph Co., and the appellee, and the American Bell Co., by and under which agreement the same messages are received and transmitted over the lines of two public servants, viz: the appellee and the West. Union Telegraph Co., organized for and engaged in the business of transmitting and receiving messages by means of electricity, and operating in connection with each other.

We repeat a second time a part of the opinion of the court quoted above. Mr. Justice Lamar, at page 119, said:

* * * "It is there said, in substance: By virtue of its connections and certain traffic contracts with other railroads, the Norfolk and Western Railroad Company 'has become a link in a through line of road, over which, as part of the business thereof, freight and passengers are carried into and out of this Commonwealth.' That is to say, the business of the through line of railroad, of which the plaintiff in error forms a part, or in which it is a link, consists, in a measure, of carrying passengers and freight into Pennsylvania from other States, and out of that State into other States. It certainly requires no citation of authorities to demonstrate that such business—that is, the business of this through line of railroad—is interstate commerce. That being true, it logically follows that any

one of the roads forming a part of, or constituting a link in, that through line, is engaged in interstate commerce, s[illegible]e the business of each one of those roads serves to increase th[illegible] volume of business done by that through line."

THE DELIVERY OF A MESSAGE IS INCIDENT TO ITS TRANSMISSION. THE ACT OF INTERSTATE COMMERCE IS NOT COMPLETED UNTIL THE DELIVERY OF THE MESSAGE; AND ALL MEANS AND INSTRUMENTALITIES EMPLOYED FOR ITS DELIVERY ARE SUBJECT TO THE REGULATING POWER OF CONGRESS.

The power of Congress to regulate commerce when applied to telegraphic communications, necessarily includes the power to regulate the receipt and delivery of messages.

All means and instrumentalities employed for the collection and delivery of interstate messages, are engaged in and are parts of interstate commerce. The act of interstate commerce is not completed until the message has finally reached its destination. The delivery is a necessary instrumentality employed by the company to perform the required service. The appellant has no greater power to regulate the receipt and delivery of such messages than it has to regulate their transmission over the wires when they reach the territorial limits of the State. If appellant has power to regulate the one, it has power to regulate the other.

The transmission of such messages over the wires would be useless without delivery, and their delivery would be impossible without transmission. The two together constitute the means of intercommunication; the two together are inseparable parts of the same act; the two together constitute the act of interstate commerce. The delivery is the very life of the message. Then only has intercommunication become accomplished. Then, and then only, has the act of interstate commerce been completed. Then, and then only, has the protecting power of Congress ceased.

The delivery of messages is paid for by the company, and

was not only designed to assist and increase the business of the company, but we may go further and say that it has come to be an absolute necessity in order to meet the demands of the public; and it is obvious that all obstructions of this service, are direct burdens upon that free and untrammelled intercourse between the States, which the Supreme Court has so often declared to exist where Congress has taken no action on the subject.

If the railroad agent in San Francisco, soliciting passengers to take his employer's line at Chicago for New York, was an agency engaged in interstate commerce, and subject to the regulating power of Congress, because, as the court said, "it assisted, or was carried on with the purpose to assist, in increasing the amount of passenger traffic on the road," can any reasonable mind question the correctness of the assertion that an agency employed for the collection and delivery of messages is also engaged in such commerce?

Could it be successfully contended that the messenger boy who carries the telegram from the office of the Western Union to its destination in Richmond is beyond the protection afforded by the interstate feature of the Constitution of the United States? We submit that Congress has full power to protect him from being prohibited or obstructed, by the State or city, from performing this very essential duty of delivering messages received over the wires of the telegraph company. If such an effort should ever be made by the city, we respectfully submit that the City Attorney would find the Congress and United States Courts had full power to protect him, and that in doing so the case of *McCall* v. *California*, 136 U. S., would be an authority in point; and applying the test there applied, and substituting the messenger boy here in the place of the agent in California, who solicited passengers of the railroad in that case, the court here would say—as the court there said—the test is: Was the business (of the messenger boy) a part of the business of the company? Did it assist, or was it carried on with the purpose to assist, the business of the company?—if so, then it was within the protection of the Constitution of the United States.

We submit that the decision in *McCall* v. *California*, answers fully these questions.

The case at bar is much stronger in our favor than the one just put of the messenger boy. The telephone transmits the message coming or going over the Western & Union line by electricity, instantly by electricity—just exactly, we insist, in the same way a message sent all the way by the Western Union line, from a point on the line in the country near Richmond to a point beyond Richmond, which had to go through the Richmond office, would be sent. Such a message would have to be transferred in the same way, at the Richmond office—from the wire coming into the office, to a wire going out of the office—in which a telephone message is transferred from the telephone wire to the telegraph wire in the Western Union office in Richmond; but, whether it is done in exactly the same way or not, the important fact that it is transferred from one wire to another in the same office, and then sent on its way to instantaneous delivery by electricity—the same motive power which brought it—is the one vital, connecting and similar fact which would render it impossible to draw a sound distinction between the two cases. If the transfer of a telegram in the Western Union office in Richmond, passing between points inside and outside of the State of Virginia, for the purpose of sending it to, or receiving it from points on its own lines, connecting in its Richmond office with its wires running out of the State, is interstate commerce—and surely this will not be denied—how can the transfer of a similar message in the Western Union office to and from telephone wires entering in the same office of the telegraph company, be held not to be interstate commerce? The transfer of freight, &c., in the case of *Foster* v. *Davenport*, 22 Howard, and in *The Daniel Ball* case, in 10 Wall., and other cases cited in this note, was much more a break in the transmission of the goods, occupied more time and gave more trouble in making the transfer, from one vessel to another, than occurs in this case.

Great reliance is placed by appellant's counsel upon *Coe* v. *Errol*, 116 U. S., 517; a case involving questions of taxation,

which went by writ of error from the Supreme Court of New Hampshire to the Supreme Court of the United States. The extract in appellant's brief, pp. 41-42, taken from a paragraph on page 528 of the report, must be read in the light of the facts, the subject under consideration, and the entire opinion.

The questions under consideration in *Coe* v. *Errol*, were precisely as follows, to-wit:

1. Whether the products of a State, though intended for export to another State, and partially prepared for that purpose by being deposited at a place or port of shipment within the State, are liable to be taxed like other property within the State?

2. Whether the owner's state of mind in relation to the goods, that is, his intention to export them, and his partial preparation to do so, exempt them from taxation.

In the very paragraph from which the City Attorney makes his extract, we find the following clause:

"It seems to us untenable, to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule, in many States there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State."

This language immediately precedes the quotation made by appellant's counsel, and, in our view, so explains and limits that quotation as clearly to show its inapplicability to the case at bar. The learned justice who delivered the opinion was indicating when a State may tax property, and showing that the partial preparation and gathering together of products for future export does not, and on principle cannot, exempt such property from taxation by the State in which the point selected as a place of deposit is located. He points out that such products may never be exported; that the owner may change his mind; that, up to this point, the exportation is a matter alto-

gether *in fieri* and not at all a fixed and certain thing. This is the line of thought in which Mr. Justice Bradley said:

"The carrying of them in carts or other vehicles or even floating them, to the depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for exportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State."

This is a part of the extract contained in the brief of appellant's counsel, upon which he so greatly relies.

How does it affect our case? What possible application can it have to a telephone message—from New York, for example—to one of the appellee's subscribers in the city of Richmond, whose messages are transmitted over Western Union wires to the office of that company in this city, and thence over appellee's wires to the addressee, who receives the message through the 'phone in his own place of business? To ask the question is to answer it.

Or, take a message from a subscriber of the appellee in Richmond to a merchant in New York, transmitted partly by 'phone and partly by Western Union wires. When such subscriber speaks his message into the 'phone, it is, in the very language of Mr. Justice Bradley, "actually launched on its way to another State." Its departure for another State is not properly a matter *in fieri*. When such message leaves the lips of appellee's subscriber, it actually begins a continuous journey to its destination, and the regulating power of Congress goes with it from the beginning to the end of the journey.

It is true that *Coe* v. *Errol* was cited in *Kidd* v. *Pearson*, 128 U. S., 1, and in *Lehigh Valley Rd.* v. *Penna.*, 145 U. S., 192; but not for the purpose of overruling, in even the slightest degree, the doctrine so clearly announced in *Foster* v. *Davenport*, 22 How., 244; *Henderson* v. *Mayor of New York*, 92 U. S.,

259–275; *Wabash Ry.* v. *Illinois*, 118 U. S., 572–3; *The Daniel Ball*, 10 Wall., 557; *McCall* v. *California*, 136 U. S., 104; *Ry. Co.* v. *Penna*, 136 U. S., 118, *et seq.*, and other like cases. *Kidd* v. *Pearson and Lehigh Valley Rd.* v. *Penna.*, are so widely differentiated from our case as to render extended comment upon them unnecessary.

In short, there is a wide distinction, not only in circumstance, but in principle, between the case at bar, on the one hand—and *Coe* v. *Errol* and the cases following it, on the other. The Errol logs, the Kidd & Pearson whiskey, had a primal original, and antecedent existence, as part of the property of the State from which they were ultimately exported, and as such, were undoubtedly subject to taxation, or to police supervision and control, by such State; and the question in all this class of cases was, whether or not this primal, original and antecedent existence and character had as yet terminated, and a new character and existence, as subjects of Interstate Commerce and of Congressional control and regulation, had as yet begun. In the case at bar, on the contrary, the moment the message from New York is uttered into the 'phone at Richmond, it is unmistakably and indelibly stamped and branded as a subject of Interstate Commerce and of Congressional control.

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3. Does the Act of Congress of July 24, 1866, embrace within its scope Telephone Companies—i. e., the Appellee in the case at bar?

On page 26 of their brief, counsel for appellant say:

"1st. We recognize the constitutionality of the above mentioned act of Congress. (*Pen. Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S., 1; *Telegraph Co.* v. *Texas*, 105 U. S., 460; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S., 530; *St. Louis* v *West. Union Tel. Co.*, 148 U. S., 92, and 149 U. S., 465.)

"2d. We recognize, as declared by act of Congress, that all streets which are letter-carrier routes are post-roads. (*St. Louis* v. *West. Union Tel. Co.*, 148 U. S., 92, and 149 U. S., 465.)

"3d. We recognize that under said act of Congress a telegraph company can obtain a right of way for its poles and wires through a city and along its streets against the wish of the municipality. (*St. Louis* v. *West. Union Tel. Co.*, 148 U. S., 92, and 149 U. S., 465.)"

What is left of appellant's case and contentions after these concessions?

Appellee was organized under the laws of the State of New York and has accepted the act of Congress of July 24th, 1866. The courts, English and American, unanimously hold that telephone companies are telegraph companies, and that telephone lines stand upon the same footing with telegraph lines. Appellant admits the constitutionality of the act of July 24, 1866, that the streets of Richmond city are post-roads, and that "a telegraph company may obtain a right of way for its poles and wires through a city and along its streets against the wish of the municipality."

We submit that the Act of July 24th, 1866, is sufficiently broad to protect the rights of the appellee and that said act was intended to protect rights of this character. The language of the act is not limited to companies doing an interstate commerce business, but applies to all telegraph companies and embraces all "post roads." Under the express terms of this act the appellee had a right to construct, maintain and operate its lines on the post roads (streets and alleys) of the city of Richmond. No distinction is attempted to be made between telegraph companies doing an interstate and those doing a local business. Unless, however, the Constitution of the United States contained some warrant for its enactment, this act would, of course, be null and void. Accordingly it was attacked and its validity, in the very first case which came before this court, was put clearly on two grounds, to-wit: that Congress had power to pass it, under both the interstate commerce provisions and the provision in the constitution which empowers Congress "to establish post offices and post roads." See *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 96 U. S., Page 1. It is clear

that the act of 1866 did not need both of these constitutional provisions to support it, but that either would have done so. Had it, however, rested entirely on the interstate commerce provision of the constitution, its language would, perhaps, have been too broad, in so far as it embraced, as it clearly does, all telegraph companies, as well as those doing local as those doing interstate business.

We do not know whether counsel for the city intend to claim that this act is unconstitutional in part, *i. e.*, as to so much of it as applies to local telegraph companies. If not, then they must admit that it rests (as we insist it does, and as was said in the case just cited) on the constitutional provision allowing Congress to establish post offices and post roads, and clearly protects a telegraph company doing merely a local business. If they claim that it is unconstitutional in part, we submit that they cannot escape the point made in our brief, that the appeal in this case by the city was improperly taken to the Circuit Court of Appeals—they having drawn in question the constitutionality of the Act of Congress of July 24, 1866.

Counsel for appellant on page 47 of their brief, in discussing the Act of Congress of July 24, 1866, say:

Extract from Brief of Appellant.

"No case decided by the Supreme Court puts the constitutionality of the act upon the ground that the telegraph forms a part of the postal service. Every decision of that court, construing said act of Congress, finds the power of Congress to enact such a statute in the clause of the Constitution of the United States as to interstate commerce."

In reply: we have just shown that the decision of this court in *Pensacola Telegraph Company* v. *Western Union Telegraph Company*, 96 U. S., 1, rested the constitutionality of the act not only upon the power of Congress to regulate commerce, but also upon its power to establish post-offices and post-roads, and—

"18. To make all Laws which shall be necessary and pro-

per for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

In that case the opinion of the court opens with the words:

"Congress has power 'To regulate Commerce with foreign Nations and among the several States.' (Const., Art. I, sec. 8, par. 3); and 'to establish post offices and post-roads,' (Const., Art. I, sec. 8, par. 7)."

And in the next two paragraphs, page 9, the court said:

"Postoffices and post roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National Government.

"The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steam boat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were entrusted to the General Government for the good of the nation, it is not only the right, but the duty of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily incumbered by state legislation."

And on p. 10: "It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service, and exclude all others from its use. The present case is satisfied, if we find that Congress has power, by appropriate

legislation, to prevent the State from placing obstructions in the way of its usefulness."

The opinion refers to the power of Congress to regulate commerce; but, from the beginning to the end, it also discusses the power of Congress "to establish post-offices and post-roads," and the opinion largely rests the constitutionality of the statute upon the power of Congress "to establish post-offices and post-roads," and its duty to enact statutes carrying this power into execution. No subsequent decision of this court has weakened the force of that opinion, or the reasoning upon which the court based its conclusions. The opinion is always approved where subsequently cited.

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158 U. S., 1.

Subject. Power of Congress over Post-Roads.

In *Roberts* v. *Northern Pacific Railroad*, 158 U. S., p. 1, Mr. Justice Shiras in delivering the opinion of the court, pp. 21–22, said:

"Congress has 'power to regulate commerce with foreign nations and among the several States,' and to 'establish post-offices and post-roads.' Const., Art. I., sec. 8, par. 3 and 7. As was said in *Pensacola Tel. Co.* v. *West. Union Tel. Co.*, 96 U. S., 10: 'The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all;' and it was held, that a law of the State of Florida which attempted to confer, upon a single corporation of its own, the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory, was inoperative against a corporation of another State, where Congress had enacted 'that any telegraph organized under the laws of any State should have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States,'

and where such other corporation had secured a right of way by private arrangements with the owners of the lands. This principle has been repeatedly recognized by this court in numerous decisions. *Telegraph Co.* v. *Texas*, 105 U. S., 460.

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158 U. S., 564.

Subject: Power of Congress and National Government over Post-Roads.

In re Debs, 158 U. S., 564, Mr Justice Brewer, in delivering the opinion of the court, at p. 599, said:

"We have given to this case the most careful and anxious attention, for we realize that it touches closely questions of supreme importance to the people of this country. Summing up our conclusions, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; **that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail.** * *."

Reply to Appellant's Fourth Contention.

The 4th contention on the part of the city (see p. 49 of its note) seems to be that the company made a contract and agreement with the city in 1884 that it would cut down its poles and remove its wires and plant, and destroy its business, whenever the city called on it to do so, without regard to any rights it might thereafter acquire from any superior or paramount authority. We fail to find any such agreement, express or implied. The only two sections of the ordinance of 1884 bearing upon this question are the first and fifth, which are as follows:

"1. Permission is hereby granted the Southern Bell Telegraph and Telephone Company to erect poles and run suitable wires thereon, for the purpose of telephonic communication throughout the city of Richmond, on the public streets thereof, on such routes as may be specified and agreed on by a resolution or resolutions of the Committee on Streets, from time to time, and upon the conditions and under the provisions of this ordinance.

"5. The ordinance may at any time be repealed by the Council of the City of Richmond; such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law."

If it be conceded here that a repeal of this ordinance carried with it a repeal of the right to occupy the streets on which the company had before then placed its poles (which is denied, and will be referred to hereafter), still the utmost that the ordinance could be construed to mean, would be that such rights as were given and claimed under this ordinance, were repealed. The ordinance doesn't say—cannot be construed to say—that anything is to be repealed except such right as was conferred under it. If, when the time for repeal comes, the company occupies the street under the rights conferred by the ordinance, and also under the rights acquired from some other source, all it would have to surrender would be the rights acquired under the ordinance. Suppose it had happened that a street was owned by a private person in fee, and that the company had under this ordinance occupied it, and after that had purchased the title from the owner; could it be held that the repeal of this ordinance would defeat the title of the company to this street? No. It could only take from it, at the most, the right given it by the ordinance. The city here (taking now the view that the city takes about the right of repeal), gives the company a right to occupy a street, with reservation of a right to repeal the ordinance. There is no agreement by the company that it will move out of the street, should this be done. There is no provision of this sort in the ordinance. But for the provision of the right to repeal, the company

could claim that the right of occupancy conferred on it by the ordinance, could not be taken away,—but the provision for repeal (interpreted as the city does it), means that the right of occupancy *granted by the city* may be taken back. That is all that it can by any possibility mean. To hold that the company agreed, or that the city intended by this that the company should agree, not to acquire other rights to occupy the streets, or that, if it did so acquire them, they should not avail it, is, we submit, going beyond all reason and authority. Under the principles contended for here by counsel for plaintiff—If A. has a house which is about to fall down for want of a prop, and were to bargain with B. to prop it up for a consideration, but with liberty to B. on 30 days notice to remove his prop—and were afterwards to bargain with C. also to put up a prop so as to be able to hold it up even if B. should withdraw his—B. would have a right upon withdrawing his prop, to compel A. to remove the prop of C., and so let his house fall. We insist that neither the right to remove the support of a prop to a house, nor the support of an ordinance to a title to occupancy, will destroy the house or title, except so far as the house or the title is dependent for its existence on the support of the prop, or the ordinance. Until the company accepted the act of Congress, if it held under the ordinance alone and that holding were destroyed, the right to hold would be gone; but, after it accepted the act of Congress, it would hold under that as well as the ordinance, and the destruction of all other rights and titles, could not deprive it of that support which is ample to sustain it, and is paramount to all other titles which it has, to occupy the streets, and "construct, maintain and operate," its lines, in the language of the Act of 1866.

Reply to Appellant's Fifth Contention.

The fifth contention by the appellant is, that the Council of the city had "the power to pass the repeal ordinance of December 14, 1894, and it is sufficiently broad to require the removal of the poles and wires already erected."

We insist, first. That the city had no authority to annex this condition of repeal to the ordinance of 1884.

The Legislature of Virginia, which is the source from which the city derives all its powers, has provided for the entry into and occupancy of the streets of the city by telegraph and telephone companies, and for the repeal, modification and alterations of the rights of such companies after they have taken possession of the streets, in Chap. 54, Secs. 1287, 1288, 1289, and 1290, of Code of Virginia of 1887. Section 1287 provides that such companies "may construct, operate and maintain its lines * * * along and over the streets of any city or town with the consent of the council thereof." The next two sections give such companies the right of eminent domain (to condemn lands, &c.), and prescribe how it is to be exercised, and the 1290th section provides that the General Assembly, at its pleasure, may revoke or modify the rights thus acquired.

There was thus no necessity for the repeal of such rights being given to the cities, the Legislature reserving this power to itself, and we submit there is no such power given by these sections to the city. All it had the power to do was to consent or refuse, and its consent once given was final, and no power to revoke it remained. Nor did it have a right to do indirectly, as by giving a conditional consent, what it could not do directly. The Legislature gave it no such power, and it has none unless it gets it from this source. See *Kirkham* v. *Russell*, 76 Va., page 956, which decides that municipal corporations can exercise "only such powers as by their charters are granted in terms expressed, or by necessary implication," and which says that any doubt arising about this matter must be resolved against the city.

In the case of *Hodges* v. *W. U. T. Co.*, 72 Miss., p. 910, it was held, "The power of a municipality over its streets under an ordinary charter, is subject to legislative control, and hence an ordinance exacting rent from a telegraph company for the use of streets for its poles is void, because in contravention of the act of 1886, which provides that any telegraph company shall "have the right to construct, operate and maintain telegraph lines on, or across or along all * * * streets," &c., making no provision for compensation to cities and towns.

The court says, pages 912 and 914, in distinguishing this case from the cases of *St. Louis* v. *W. U. Tel. Co*, 148 U. S., p. 92, and 149 U. S., p. 465, in which such a charge was maintained in favor of the City of St. Louis "the ground upon which the ordinance of St. Louis * * was placed * * is that the city of St. Louis is the absolute owner in fee of its streets and the charter powers of the city are *self appointed. It is expressly declared that St. Louis occupies a unique position. It does not like most cities derive its powers by grant from the legislature, &c,*" and then goes on to say that in the case before the court, as in the case here "all the power which the city has over its streets is derived from the legislature, whose power over them is supreme and transcendent." It is true, that in the Mississippi case, no right was given the city to consent to or refuse, the entry of the company upon its streets; but we insist that the power given the city of Richmond by the legislature of Virginia was simply a power to consent or refuse. It was never intended that the city should bargain and dicker with a company seeking to enter upon its streets and make conditions with it, not only not contemplated by the statute under which it was acting, but which were inconsistent with and opposed to its express provisions.

In the Mississippi case just cited, the ordinance was held void because the State statute gave the city no authority to annex any condition at all to the use of its streets. In the case at bar, the State law authorizes the city to consent or refuse that the wires of the company should be run "*over*" the streets, and the city claims the right, by refusing to give this consent, to compel the company to unite with it and change the law of the State so as to make its wires run "*under*" the streets. Surely the case at bar is stronger against the claim of the city here, than the case in Mississippi was against the claim of the city there, for in the Mississippi case the city merely undertook to annex a condition not authorized by the State, and about which the statute was silent, whilst here the city has not only annexed a condition not authorized by the State, but directly opposed to and subversive of the terms of the State

statute. In the first case it did what the statute was silent about. In the second case it nullifies the statutory provision, and then substitutes one of its own in conflict therewith. In the Mississippi case it built up what was unauthorized. In the case at bar it first pulls down what the State has built, and then builds what it has no authority to do on the wreck it has made of the State statute.

That the city cannot thus use its right to consent to or refuse the entry of a company into its streets, given by the statute to overturn and nullify the same and impose conditions directly in conflict with the conditions imposed by the statute, was decided.

In the case of the appeal of the city of Pittsburg, 115 Pa., p. 4, the court held that though a gas company—empowered by the Legislature to lay its pipes under the streets of the city and vested with the power of eminent domain (like the plaintiff here) which (see p. 21 of the report) could not enter upon or lay down its pipes or conduits on any street * * * of any city * * * without the assent of the Council—had accepted an ordinance of the city which undertook to provide conditions and restrictions under the ordinance by which the city gave its consent for the occupation of the streets, still the company was entitled to occupy the streets and disregard the conditions.

On page 21 the court says: "The Council are authorized to give or withhold their consent without more. They, the Council, have no right to couple their assent with any condition or restriction not imposed by the act, unless the company agrees to accept the same and be bound thereby, and even then the condition of restriction so accepted by this company must harmonize and in no way conflict with the provisions of the act," and on page 24 "that the grant of assent was good and the conditions null and void."

The lower court, whose decision was affirmed in this case, had said, page 11, in speaking of the contest between the city and company over the validity of the ordinances that the city met the company's objections by replying "that it is immaterial; the act says you cannot enter without our assent: we as-

sent on these conditions; you must either accept them or stay out." It will be seen that the contention made in the Pennsylvania case was exactly the contention that the city of Richmond is making here. The Pennsylvania court said of this, however, on page 12, "if a city or borough does not want natural gas for consumption, it can refuse its assent to any companies entering for the purpose. But if it wants natural gas and gives its assent it must be on the terms and conditions of the statutes."

The city here, in the case at bar is insisting that it can, under a statute law which authorizes it to consent to the company's running its lines "along and over the streets," require the company to agree, *as a price for its consent* to a condition which would make it run its wires along and under the streets. So that the city is seeking to impose conditions not only not warranted by the legislative act under which it was acting, but which in fact are directly and point blank in conflict with its terms and provisions. The Legislature says the city may consent to the wires being run "over" its streets, and the city consents provided the company will agree that the wires shall be run *under* the streets.

Were the rights of the company resting alone under the State statute, the ordinance of the city requiring it to run under the streets would be, as was decided in Mississippi and Pennsylvania, null and void, because in conflict with the State law.

We do not see that the case of the *R. F. & P. R. R. Co.* v. *The City of Richmond*, 26 Gratt., 83, and in 96 U. S., page 521, cited by appellant's counsel, has any bearing on this point. In this case the railroad company claimed under an ordinance which (see 26 Gratt., pages 88–89) is as follows: "Whereas, by a resolution of the President and Directors of the Richmond, Fredericksburg and Potomac Railroad Company, submitted to the Common Council, it appears that it is deemed most expedient by the President and Directors to conduct the said railroad from the Richmond Turnpike, along H street, to a point at or near the intersection of said street and Eighth street, and for the present to terminate the same by suitable connections with the

contemplated warehouses and workshops of the company on lots Nos. 477, 478, purchased by them from John Heth:

"*Resolved*, That the Common Council do approve the proposed location of the said railroad and the present termination of the same, as described in the foregoing resolution, and authorize the prosecution of the said work within the limits of the city on the above locations: provided, that in locating the said railroad, no injury shall be done to the water pipes now laid in and along said street: provided further, that the corporation of Richmond *shall not be considered* as hereby parting with any power or chartered privilege not necessary to the said railroad company for constructing said railroad and connecting the same with the depot of the said company within the limits of the city."

The railroad company insisted that this gave them the right to use steam, and the city denied them the right to use steam. No attempt was made to deny the railroad company the right to run its trains and make its connections in the city, but the city claimed the right, in regulating the use of its streets, to prohibit the use of steam in the street used. The Court of Appeals of Virginia decided that the city had this right, saying on page 90 and 91:

"Not a syllable is recorded about the mode or manner of transportation, whether by horse-power or steam, the entire regulation of that subject being reserved to the corporation with the rest of its chartered powers."

And this court says in effect that its decision in this case would have been the same on this point if the assent of the city "had been absolute and unconditional." Showing that the decision was based, not on the effect of a condition attached to the ordinance, but on the power of the city to control railroads running through its streets, independent of any such supposed condition.

The Supreme Court of the United States affirmed this decision and merely held that "the power to approve implied a power to reject one location and accept another," and this necessarily

carries with it the further power to reserve such governmental control over the company in respect to the road when built within the city to the point approved, as may seem to be necessary. "*The absolute grant of the charter is satisfied if the road is built within the city for any distance, by any route, or to any point,*" 96 U. S., page 527 (italics ours). * * * And again: "By the condition imposed, these powers were all reserved, except to the extent of permitting the company to construct its road upon the route designated, and connect it with the depot. * * The company therefore occupied Broad street upon the same terms and conditions it would if the charter had located the route of the road within the city, but, in terms, subjected the company to the government of the city in respect to the use of the road when constructed."

True, the court held that the city had the right to prohibit the use of steam. But suppose the city had granted the railroad company the right to go to some point in the city, had approved of some point therein, and inserted a proviso in the ordinance, that they would repeal the ordinance making this grant and giving this approval, whenever they saw fit, and would revoke the right of the railroad to enter the city at all, and require it to remove its tracks from the street. That would have been a case more like the case at bar, and like the case in 115 Pa., and the court would, we imagine, have decided that the city had no power to insert such a proviso or condition in its assent to the selection of a terminal point for the railroad company, because it was not contemplated by the Legislature that it should do so.

We have said before that we cannot see how the plaintiff can be held to have agreed, by putting up its poles and wires under the ordinance of 1884, to take down these poles, and remove its wires from the streets in which they were put, on the repeal of said ordinance. The 5th section of that ordinance, which will be found on pp. 31–32 of the record, merely provides that this ordinance may be repealed at any time, &c. Surely, however broad a scope may be given to this section, it cannot be contended that a repeal of the ordinance, would repeal anything but the rights held under it, whilst the rights now claimed and

held by the plaintiff under the act of Congress of 1866, to "construct, maintain and operate," its lines could not be affected by such repeal; and no agreement that such rights were to be surrendered, can be inferred. Certainly no such agreement was made. In fact, it was not only not agreed that the rights of the plaintiff, acquired under this ordinance of 1884, in the streets and alleys where it had located its poles and wires under the first provision of the ordinance, should be repealed by the repeal ordinance, but such is not the meaning of the ordinance. We insist, secondly, that—

THE ORDINANCE NEVER INTENDED BY THE FIFTH SECTION TO PROVIDE FOR A REPEAL WHICH WOULD CAUSE THE REMOVAL OF POLES AND WIRES ON ROUTES AT THE TIME OCCUPIED BY THE COMPANY.

The first provision provides: "Permission is hereby granted the Southern Bell Telephone and Telegraph Company to erect poles and run suitable wires thereon, for the purpose of telephonic communication throughout the city of Richmond, on the public streets thereof, on such routes as may be specified and agreed on by a resolution or resolutions of the Committee on Streets, from time to time, and upon the condition and under the provisions of this ordinance."

The right here given to the plaintiff was to "erect poles and run suitable wires thereon * * on the public streets * * on such routes as may be specified and agreed on by a resolution or resolutions of the Committee on Streets, from time to time, and upon the conditions and under the provisions of this ordinance." The 5th section provides for a repeal of this ordinance; but we insist that the repeal of an ordinance allowing the erection of poles, &c., cannot and does not mean that poles already erected are to be cut down. No person would have imagined, on reading this ordinance, that its repeal, provided for in the 5th section, meant and carried with it the right to destroy valuable property and rights acquired under the ordinance whilst it was in force.

The court should not give it this destructive interpretation,

unless its language is so clear as to compel it to do so. The fair and natural meaning of this provision is that whilst the property and rights acquired under the ordinance while in force, are not to be disturbed, the further extension of the right to erect poles, &c., on streets to be agreed on by the Committee on Streets, is to cease.

The provision that the repeal ordinance was not to take effect till 12 months after its repeal, was simply meant to guard the plaintiff from the power the city otherwise would have had, to have repealed the ordinance within ten days after the work had begun—by which all the expense of the work such as the purchase of poles, wires and instruments, &c., might have been incurred and none of the benefits been secured,—whilst if it had the power to locate its poles and wires, as provided for in the first section of the ordinance, *for 12 months*, it would be able to secure a sufficient foothold for its work. Under such a condition of things, the Committee on Streets would have been morally and legally bound to have designated the streets in which the poles and wires were to be placed until the twelve months had passed. So we insist that not only was it not agreed by the company that it should remove its poles from the streets, no matter what its rights were to remain there under the acts of Congress, under which its rights subsequently were secured and protected, but that it was not agreed or even contemplated by the ordinance of the city itself, passed in 1884, that the company's poles and wires located, and rights acquired under the ordinance, were to be removed and destroyed by its repeal. The company's rights in this respect would be protected if they rested alone on the city ordinance of 1884.

The case of *Greenwood* v. *Freight Co.*, 105 U. S., 13, cited by counsel for defendant, has no application. That was a case where a State, by act of Legislature, chartered a company under a law which gave it the right to repeal the acts of incorporation, and all the court decided was, that a repeal of the act chartering the company, repealed the charter of the company, and in fact destroyed the company, and of course with it the right to use the streets of the city, and in fact to do any corporate act. Such a question might arise in this case, if the Legis-

lature of New York had the power to repeal the plaintiff's charter, and undertook to do so, but has, we submit, no bearing at present, on the controversy.

If a builder were to apply to the city of Richmond to put up a number of frame houses, and the Council were to pass an ordinance saying that he might put up as many as he wanted on such streets and in such places in the city "as may be specified and agreed on by a resolution or resolutions of the Committee on Streets from time to time, upon the conditions and under the provisions of this ordinance," and there was in the ordinance a provision for its repeal, on notice. It could hardly be contended we think, the frame houses which were put up while the ordinance was in force, would have to be pulled down after its repeal. The only effect of repeal would be to stop the building of more, just as we contend here, that the only effect of the repeal, even if the rights of the company stood alone on the city ordinance, and the city had the right to repeal it, and had done so, would be to stop the further erection of poles and running of wires thereon, on routes not before given to the company.

It would have been unreasonable in the extreme for the company to have consented in advance that its poles and wires which had been erected and strung at great expense, by the permission of the city, should be taken down and thus rendered useless whenever the city chose to so order it. And no agreement to that effect can be inferred from doubtful language, or effected by adopting the strained and unreasonable interpretation that a repeal of an ordinance allowing a company to erect poles and run wires, meant that the poles erected and wires run should be cut down.

Indeed, the ordinance which was passed under the power claimed by the city under the fifth clause of the ordinance allowing the company to erect poles, &c., does not, on its face, attempt to do more than forbid the erection of poles and running of wires in the future. The first ordinance provided that permission was granted to the company "to erect poles and run suitable wires thereon for the purpose of telephonic communication throughout the city of Richmond, on public streets thereof, on such routes as may be specified and agreed on by a

resolution or resolutions of the Committee on Streets from time to time." There is no other portion of this ordinance which grants "privileges and rights" to the company. The other sections prescribe limitations and restrictions as to the location of poles, cutting shade trees, &c. The ordinance approved 14th December, 1894, repeals the ordinance first mentioned, and then says, section 2: "All privileges and rights granted by said ordinance shall cease and be determined at the expiration of twelve months from the approval of this ordinance." "All privileges and rights which were to cease and determine," means, by reference to the first ordinance, the right to erect poles and run wires on such routes as may be specified and agreed on by the Committee on Streets from time to time, and this language can give no authority for the removal of poles and wires already placed, or for refusal to allow the company to replace wires and poles on the streets already occupied by them, by and with the permission of the Committee on Streets. It only stops future location, under the direction of the Committee on Streets given from time to time, and if there is no ordinance requiring the company to remove poles and wires, approved twelve months before the period when it is to take effect (the proviso in the first ordinance requiring twelve months' notice), the city cannot require it of the company, even though the fifth section of the first ordinance were valid and clearly authorized the passage of an ordinance requiring the poles and wires to be removed.

Reply to Sixth Contention of Appellant.

The court has never decided, and we have never contended, that the appellee is free from reasonable and proper control of the city. This matter has been discussed fully by us in the former part of this note, and the record we submit shows that the struggle here, on the part of the company, has been, not for freedom from control on the part of the city, but for the right to exist, "to construct, maintain and operate its lines." The city is demanding sentence of death on us, and we are asking only for life. When this, our life, is assured to us, as we confidently think will be the case, we earnestly trust that there will be no

need for further appeal to the courts, as we are anxious to submit to all reasonable and proper control, and hope and trust that the city will not seek to impose more than this on us.

In this connection, however, though we do not think the question need now be considered—for the city denies that we have any rights at all in its streets—we beg leave to refer the court a little more in detail to what are called the Subway cases, decided in New York, by which the wires of telegraph and other companies were put underground, and which have gone farther than any we know of in this matter to give the city control over the wires of companies in its streets. They are the cases of *The Western Union Telegraph Company* v. *The Mayor of New York*, 38 Fed. Rep., and the *American Rapid Telegraph Company* v. *Jacob Hess*, 125 New York. We do not think that either of these decisions controvert the doctrine we have contended for. The court especially says in *The Western Union Telegraph Company* v. *The Mayor of New York*, 38 Fed. Rep., p. 555: "The State, when providing by legislation for the protection of the public health, public morals, or public safety, is subject to the paramount authority of the United States, and may not violate the rights secured or granted by that instrument, or affect the power confided to the general government," and quotes with approval the language of the Supreme Court, which says:

"For while it may be a police power, in the sense that all provisions for the health, comfort and security of the citizens, are police regulations, and an exercise of the police power, it has been said more than once in this court, that even where such powers are so exercised as to come in the domain of the Federal authority, as defined by the constitution, the latter must prevail."

This decision, evidently, like the case of the *American Rapid Telegraph Co.* v. *Jacob Hess*, 125 N Y., 552, was based upon the ground on which the New York court puts it on page 650, "that the laws of Congress were perfectly satisfied," and the rights granted under those laws, preserved and protected by what the New York Legislature had done. In these cases, there

was no attempt made to take from the companies their franchises, to drive them out of the streets of New York, as is the case here, but they were simply required to put the wires in underground passages *which had been already provided for them*, when notified so to do by the authorities. Both of these cases it seems to us, concede that the rights granted under the act of 1866, are superior to the powers of the States and cities under their police power. And especial emphasis is laid on the fact that the conduits had been built, and were ready for use, whilst in this case the company is required to build, not only for itself, but for its rivals and for the city, (the latter without compensation).

Again, the action which prevailed in New York was taken under a statute and not under a city ordinance, and applied only to cities having a population of half a million. It will also be noticed that the Court, in the case in 38 Fed. Rep., p. 560, decided clearly and distinctly that the telegraph company could not be compelled to remove its wires entirely from the streets or post roads, as it restrained and enjoined the removal of the wires from the elevated railways, which were the only post roads from which, under the claim of the city, they were compelled to be removed, as in the streets they could remain by being put in subways already provided for them. Whilst neither of these cases are opposed to our contention in the case at bar, and in fact we insist sustain our positions, we submit that, were it necessary to do so, we could appeal with some confidence to this court to refuse to concur, at least in so much of the opinion as construed the language of the act of Congress, which says, "along and over," to mean *along and under* the streets.

Ground for Equitable Jurisdiction

Ample ground for equitable relief and for injunction exists. The statements in the bill, on pages 11 and 12 of the record, (which, so far as uncontradicted or questioned, are admitted as true) show this. Not only were there grounds for fearing this action of the city, and threats against our rights calling for this protection, but our customers were being deterred from dealing

with us, and driven off to our rival, and our business ruined, by these ordinances, and by these threats based upon them; and unless the court had interfered we were absolutely without redress. The constant menace of the city, affected by merely holding over us the ordinances threatening the company with expulsion from its streets and destruction, naturally and necessarily would drive off its customers to its rival, and ruin its business, and was doing so, till the court granted its injunction, as was proved by the statement of Mr. Rood, p. 82 of record. This would alone be ground for equitable relief. Indeed, the company had no other remedy, and would have lost all its business and customers had it not appealed to the court. The contention, of counsel for defendant, on this point, is fully answered by the decision of the Supreme Court of Maryland in the case of *Riddick* v. *City of Baltimore*, 49 Md., p. 217, in which the court sustained an injunction to restrain the city from enforcing the collection of fines, imposed by ordinances, before its Mayor. The fines are, like the fines in this case, imposed to enforce obedience to an ordinance of the city, and the court enjoined not only the action which had been brought, but others which were threatened; and says that where a municipal corporation is seeking to enforce an ordinance which is void, a court of equity has jurisdiction at the suit of any person injuriously affected thereby, to stay its execution by injunction.

This case has been cited with approval by the Supreme Court of the United States in the case of *New Orleans Water Works Co.* v. *City of New Orleans*, on page 481 of 164 U. S.

Respectfully submitted,

GEORGE H. FEARONS,
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Solicitors and of Counsel for
Southern Bell Telephone and Telegraph Co.

RICHMOND *v.* SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.

CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 264. Argued April 24, 25, 1899. — Decided May 22, 1899.

The provisions in the act of July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," and Rev. Stat. §§ 5263 to 5268, in which those provisions are preserved, have no application to telephone companies, whose business is that of electrically transmitting articulate speech between different points.

THE statement of the case is made in the opinion of the court.

Mr. C. V. Meredith and *Mr. Henry R. Pollard* for the city of Richmond.

Mr. Hill Carter and *Mr. Addison L. Holladay* for the Southern Bell Telegraph and Telephone Company. *Mr. George H. Fearons* was on their brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

The principal question in this case is whether the Circuit Court and the Circuit Court of Appeals erred in holding that the appellee was entitled to claim the benefit of the provisions of the act of Congress approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes." 14 Stat. 221, c. 230.

By that act — the provisions of which are preserved in sections 5263 to 5268, inclusive, Title LXV, of the Revised Statutes of the United States — it was provided:

"§ 1. That any *telegraph* company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall have the right to construct, maintain and

operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance and operation of said lines of telegraph, and may preëmpt and use such portion of the unoccupied public lands subject to preëmption through which its lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"§ 2. That telegraphic communications between the several departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster General.

"§ 3. That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association or person: *Provided, however*, That the United States may at any time after the expiration of five years from date of the passage of this act, for postal, military or other purposes, purchase all the telegraph lines, property and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected.

"§ 4. That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster

General, of the restrictions and obligations required by this act." 14 Stat. 221, c. 230.

Subsequently, by an act approved June 8, 1872, all the waters of the United States during the time the mail was carried thereon; all railways and parts of railways which were then or might thereafter be put in operation; all canals and all plank roads; and all letter carrier routes established in any city or town for the collection and delivery of mail matter by carriers, were declared by Congress to be "post roads." 17 Stat. 308, c. 335. These provisions are preserved in section 3964 of the Revised Statutes of the United States.

By an act approved March 1, 1884, "all public roads and highways, while kept up and maintained as such" were declared to be "post routes." 23 Stat. 3, c. 9.

Proceeding under an act of the legislature of New York of April 12, 1848, and acts amendatory thereof, certain persons associated themselves on the 11th day of December, 1879, under the name of the Southern Bell Telephone and Telegraph Company. The articles of association stated that the general route of the line or lines of the company should be from its office in the city of New York, "by some convenient route through or across the States of New Jersey, Pennsylvania, Delaware, Maryland and Virginia, or otherwise, to the city of Wheeling or some other convenient point in the State of West Virginia, and thence to and between and throughout various cities, towns, points and places within that part of the State of West Virginia lying south of the Baltimore and Ohio Railroad, and within the States of Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida, the said line or lines to connect the said cities of New York and Wheeling together, and the said other cities, towns, points and places, or some of them, or points within the same, together or with each other or with said cities of New York and Wheeling."

By an ordinance passed by the city of Richmond on the 26th day of June, 1884, it was provided: "1. Permission is hereby granted the Southern Bell Telephone and Telegraph Company to erect poles and run suitable wires thereon, for the purpose of telephonic communication throughout the city

of Richmond, on the public streets thereof, on such routes as may be specified and agreed on by a resolution or resolutions of the committee on streets, from time to time, and upon the conditions and under the provisions of this ordinance. 2. On any route conceded by the committee on streets, and accepted by the company, the said company shall, under the direction of the city engineer, so place its poles and wires as to allow for the use of the said poles by the fire alarm and police telegraph, in all cases giving the choice of position to the city's wires, wherever it shall be deemed advisable by the council or the proper committee to extend the fire alarm and police telegraph over such route. 3. The telephone company to furnish telephone exchange service to the city at a special reduction of ten dollars per annum for each municipal station. 4. No shade trees shall be disturbed, cut or damaged by the said company in the prosecution of the work hereby authorized without the permission of the city engineer and consent of the owners of property in front of which such trees may stand, first had and obtained; and all work authorized by this ordinance shall be, in every respect, subject to the city engineer's supervision and control. 5. The ordinance may at any time be repealed by the council of the city of Richmond; such repeal to take effect twelve months after the ordinance of resolution repealing it becomes a law."

The Code of Virginia adopted in 1887, § 1287, provided that "every telegraph and every telephone company incorporated by this or any other State, or by the United States, may construct, maintain and operate its line along any of the state or county roads or works, and over the waters of the State, and along and parallel to any of the railroads of the State, provided the ordinary use of such roads, works, railroads and waters be not thereby obstructed; and along or over the streets of any city or town, with the consent of the council thereof."

Under date of February 13, 1889, the Southern Bell Telephone and Telegraph Company filed with the Postmaster General its written acceptance of the restrictions and obligations of the above act of July 24, 1866.

The present suit was brought by that company in the Circuit Court of the United States against the city of Richmond.

The bill alleged that the plaintiff was engaged in the business of a "telephone" company, and of constructing, maintaining and operating "telephone" lines in, through and between the States of Virginia, West Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida; that it had been so engaged for a period of about fifteen years, during which time it had continuously maintained at various places in said States and in Richmond, Virginia, an exchange, poles, wires, instruments and all other apparatus and property necessary for the maintenance and operation of "telephones and telephone lines," and had erected and maintained through and along the certain streets and alleys of that city numerous poles and wires for conducting its business; that it had so conducted its business and erected and maintained its lines, wires and poles under and by authority of the common council and board of aldermen of the city of Richmond, the legislature of Virginia and acts of the Congress of the United States; that its "telephone" wires and poles were used by its subscribers in connection with the Western Union Telegraph Company under an agreement between the plaintiff and that company for the joint use of the poles and fixtures of both companies in sending and receiving messages; that its business was in part interstate commerce by reason of its connections with the above telegraph company; and that its status was that of a telegraph company under the laws of the United States and of the State of Virginia and of other States of the United States, and that it was and is in fact chartered as a telegraph company under the general laws of New York.

The plaintiff also alleged that it had accepted the act of Congress of July 24, 1866; that by virtue of such acceptance it became entitled to construct, maintain and operate lines of telephones over and along any of the military roads and post roads of the United States, which had then been or might thereafter be declared such by law; that the streets, alleys and highways of the city of Richmond are post roads of the United States; that the several departments of the

Government of the United States located in Richmond have used in that city the plaintiff's electrical conductors, and other facilities for the transmission of instructions, orders and information to officers and persons in the administration of governmental affairs and on other business throughout the several States and the District of Columbia and in foreign countries; that under and by virtue of the Virginia Code, section 1287, the plaintiff was authorized and empowered to construct, maintain and operate its lines of poles and wires, with necessary facilities, along and over the streets of any city or town in Virginia with the consent of the council thereof, and under and by virtue of the power and authority therein conferred, all of which was additional to the right given by the above act of Congress, it maintained and operated its lines in the streets of the city of Richmond, and had in all respects complied with the legal obligations and requirements imposed; that relying upon its right to erect, maintain and operate its lines along and over the streets and alleys of Richmond, it entered upon said streets and alleys and had conducted its business and executed its contracts, of which a large number were in force, to furnish and afford "telephonic" facilities to the residents of Richmond and to persons outside of the city of Richmond, and with the officers and agents of the Federal Government; and that under the act of Congress of 1866 it was and is entitled to maintain and operate its lines through and over the streets and alleys of the city of Richmond, "*without regard to the consent of the said city*, and it did in fact locate many of its poles and wires and begin the operation of its business *without applying to the said city for permission to do so*."

The bill then referred to an ordinance of the city approved July 18, 1891, and alleged that it was in conflict with the plaintiff's rights and void. It referred also to a subsequent ordinance of December 14, 1894, repealing the ordinance of June 26, 1884, granting the right of way through the city to the plaintiff, and providing "that in accordance with the fifth section of said ordinance all privileges and rights granted by said ordinance shall cease and be determined at the expiration

of twelve months from the approval of this ordinance by the mayor."

Reference was also made in the bill to two ordinances passed September 10, 1895, by one of which it was provided, among other things: "1. That all poles now erected in the streets or alleys of the city of Richmond, for the support of wires used in connection with the transmission of electricity, except such as support wires required by the city ordinances, to be removed and run in conduits, shall hereafter be allowed to remain only upon the terms and conditions hereinafter set forth. 2. No pole now erected for the support of telephone wires shall remain on any street in said city after the 15th day of December, 1895, unless the owner or user of such pole shall first have petitioned for and obtained the privilege of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of this ordinance, and such other conditions as the council may see fit to impose. And if such owner, failing to obtain such privilege as above required, shall neglect or fail to remove such pole or poles and telephone wires supported thereon from the streets or alleys of the city by the 20th day of December, 1895, and restore the street to a condition similar to the rest of the street or alley contiguous thereto, the said owner shall be liable to a fine of not less than five nor more than one hundred dollars for every such pole so remaining in the street or alley; to be imposed by the police justice of the city; each day's failure to be a separate offence."

By the other ordinance of September 10, 1895, it was among other things provided: "The city council will grant permission to any company, corporation, partnership or individual to place its wires and electrical conductors in conduit under the surface of said streets of the city; any such individual, partnership, corporation or company desiring such permission shall petition to the council therefor; such petition shall name the streets, alleys and the side and portions thereof to be used and occupied by such conduits, and shall submit maps, plans and details thereof to accompany such petition."

The bill contains additional allegations to the effect —

That the fifth section of the ordinance of 1884 was null

and void; that the ordinances referred to were unreasonable, *ultra vires*, and unconstitutional; that the plaintiff was entitled, "*independent of and superior to the consent of the city of Richmond*," to "construct, maintain and operate" its lines "over and along" the streets of that city; that telephone companies and their business were embraced by the terms of the act of Congress, and that, in fact, telephone and telegraph companies were, for the purposes embraced by that act, one and the same; that the post roads spoken of in the act were not limited to routes on the public domain, but embraced all post roads of the United States that had been or might hereafter be declared such by Congress; that the streets and alleys of the defendant being post roads, the plaintiff had the right under the act of Congress "to occupy the streets and alleys of the city of Richmond for its purposes, guaranteed to it by the Constitution and laws of the United States, *superior to any power in the said city to prevent it from so doing;*" and that it "claims not only the right to maintain its present poles and wires along the streets and alleys now occupied by it, but to extend them to other streets and alleys as its business and the business interests of the country and its patrons may require."

The city demurred to the bill of complaint, but the demurrer was overruled. 78 Fed. Rep. 858.

An answer was then filed which met the material allegations of the bill and the cause was heard upon the merits.

In the Circuit Court a final decree was entered in accordance with the prayer of the bill, as follows: "The court, without passing on the rights claimed by the complainant company under the laws of Virginia and the ordinances of the city of Richmond, is of opinion and doth adjudge, order and decree, that the complainant company has, in accordance with the terms and provisions and under the protection of the act of Congress of the United States approved July 24, 1866 (which is an authority paramount and superior to any state law or city ordinance in conflict therewith), the right 'to construct, maintain and operate its lines over and along' the streets and alleys of the city of Richmond, both those now

occupied by the complainant company and those not now so occupied, and to put up, renew, replace and repair its lines, poles and wires over and along said streets and alleys, as well as to maintain, construct and operate the same, and to connect its lines with new subscribers along said streets and alleys, and the said city of Richmond, its agents, officers and all others are enjoined and restrained from cutting, removing or in any way injuring said lines, poles and wires of the complainant company, and from preventing or interfering with the exercise of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising its said rights. And the court doth adjudge, order and decree that the defendant do pay to the complainant its costs in this suit incurred to be taxed by the clerk, and this cause is ordered to be removed from the docket and placed among the ended causes, but with liberty to either party hereto on ten days' notice to the other to reinstate this cause on the docket of this court, on motion, for the purpose of enforcing and specifically defining, should it become necessary, their respective rights under this decree."

The city asked that the decree be modified by inserting therein after the words "construct and operate the same," the following words: "so far as to receive from and deliver to the Western Union Telegraph Company messages sent from beyond the limits of the State of Virginia, or to be sent beyond the said limits;" and by inserting therein after the words, "interfering with the exercise of the aforesaid rights by the complainant company," the following words: "so far as the reception from and delivery to the Western Union Telegraph Company of any message sent from beyond the limits of the State of Virginia, or to be sent beyond said limits." But counsel for complainant objected, and the court (using the language of its order) "intending by said injunction to enjoin the city from interfering with the local business and messages, as well as those of an interstate character," refused to so modify the decree.

Upon appeal to the Circuit Court of Appeals it was held

that the plaintiff came within the protection and was entitled to the privileges of the act of Congress of July 24, 1866; and that under that act it had the right to construct, maintain and operate lines of telegraph over and along any of the post roads of the United States, and "when an effort is made, or threatened, to deal with it as a trespasser, it can refer to that act."

The Circuit Court of Appeals also held that the privileges so granted were to be enjoyed in subordination to public and private rights, and that the municipality could establish lawful provisions regulating the use of the highways mentioned in the act of Congress. "This being so," that court said, "the injunction granted by the Circuit Court is too broad in its language and effect. There should have been the recognition of a proper exercise of the police power by the municipal corporation, and the use by the complainant of its poles and lines should have been declared to be subject to such regulations and restrictions as may now or may be hereafter imposed by the city council of Richmond, in the proper and lawful exercise of the police power." 42 U. S. App. 686, 697, 698.

The decree of the Circuit Court was reversed, and the cause was remanded to that court with instructions to modify the terms of the injunction therein granted so as to conform to the principles declared in the opinion of the Circuit Court of Appeals. Judge Brawley concurred in the result, but was not inclined to assent to so much of the opinion as held that a telephone company, such as was described in this case, and whose business was local in character, was within the purview of the act of Congress of July 14, 1866, relating to telegraph companies.

The case is now before this court upon writ of certiorari.

The plaintiff's bill, as we have seen, proceeded upon the broad ground that it is entitled, in virtue of the act of Congress of 1866, to occupy the streets of Richmond with its lines without the consent, indeed against the will, of the municipal authorities of that city. That, it would seem, is the ground upon which the decree of the Circuit Court rests;

for it was declared by that court that the plaintiff had the right, under the provisions and protection of that act, to construct, maintain and operate its lines over and along the streets and alleys of Richmond, both those then occupied by the plaintiff company and those not then so occupied, and to put up, renew, replace and repair its lines, poles and wires over and along such streets and alleys, and to maintain, construct and operate the same, as well as to connect its lines with the new subscribers along the streets and alleys of the city.

The Circuit Court of Appeals, while holding that the plaintiff was entitled to avail itself of the provisions of the act of 1866 — a question to be presently considered — adjudged that the rights and privileges granted by that act were to be enjoyed in subordination to public use and private rights, and subject to any lawful exercise of the police power belonging to the State or to one of its municipalities. This was in accordance with what this court had adjudged to be the scope and effect of the act of 1866.

In *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530, 548, it was held that the act of 1866 was a "permissive" statute, and that "it never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

In *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 100, which involved the question whether a corporation proceeding under the act of 1866 could occupy the public streets of a city without making such compensation as was reasonably required, it was said to be a misconception to suppose that the franchise or privilege granted by the act of 1866 carried "with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights.

While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the Federal Government to a corporation, state or national, to construct interstate roads or lines of travel, transportation or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of franchise from the National Government, a corporation assumes to enter upon property of a public nature belonging to a State. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the State-house grounds of the State, and construct its depot there, without paying the value of the property thus appropriated. Although the State-house grounds be property devoted to public uses, it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and it is not within the competency of the National Government to dispossess the State of such control and use or appropriate the same to its own benefit or the benefit of any of its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State. While for the purposes of travel and common use they are open to the citizens of every State alike, and no State can by its legislation deprive a citizen of another State of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or a corporation of the same or another State, or a corporation of the National Government, it is within the competency of the State, representing the sovereignty of that local public, to

exact for its benefit compensation for this exclusive appropriation. It matters not for what the exclusive appropriation is taken, whether for steam railroads or for street railroads, telegraphs or telephones, the State may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated."

But independently of any question as to the extent of the authority granted to "telegraph" companies by the act of 1866, we are of opinion that the courts below erred in holding that the plaintiff, in respect of the particular business it was conducting, could invoke the protection of that act. The plaintiff's charter, it is true, describes it as a telephone and telegraph company. Still, as disclosed by the bill and the evidence in the cause, the business in which it was engaged and for the protection of which against hostile local action it invoked the aid of the Federal court, was the business transacted by using what is commonly called a "telephone," which is described in an agreement between the Western Union Telegraph Company and the National Bell Telephone Company, in 1879, as "an instrument for electrically transmitting or receiving *articulate speech*."

Our attention is called to several adjudged cases in some of which it was said that communication by telephone was communication by telegraph. *Attorney General* v. *Edison Telephone Co.*, L. R. 6 Q. B. D. 244, 255; *Chesapeake & Potomac Telephone Co.* v. *B. & O. Telegraph Co.*, 66 Maryland, 399; *Wisconsin Telephone Co.* v. *City of Oshkosh*, 62 Wisconsin, 32; *Duke* v. *Central New Jersey Telephone Co.*, 53 N. J. L. 341; *Cumberland Telephone and Telegraph Co.* v. *United Electric Railway Co.*, 42 Fed. Rep. 273. Upon the authority of those cases it is contended that the act of Congress should be construed as embracing both telephone and telegraph companies.

The English case was an information filed for the purpose of testing the question whether the use of certain apparatus was an infringement of the exclusive privilege given to the Postmaster General by certain acts of Parliament as to the transmission of "telegrams." The court held that the Post-

master General was entitled, looking at the manifest objects of those acts and under a reasonable interpretation of their words, to the exclusive privilege of transmitting messages or other communications by any wire and apparatus connected therewith used for telegraphic communication, or by any other apparatus for communicating information by the action of electricity upon wires. The Maryland case involved the question whether a company organized under a general incorporation law of Maryland was authorized to do a general telephone business. In the Wisconsin case some observations were made touching the question whether telephone companies, although not specifically mentioned in a certain general law of that State, could be incorporated with the powers given to telegraph companies by that statute, which, as the report of the case shows, authorized the formation of corporations for the purpose of building and operating telegraph lines or conducting the business of telegraphing in any way, "or for any lawful business or purpose whatever." The New Jersey case involved the question whether a company organized under the act of that State to incorporate and regulate telegraph companies was entitled to operate and condemn a route for a telephone line. The last case involved the rights of a telephone company under statutes of Tennessee, one of which related in terms to telegraph companies, and the other authorized foreign and domestic corporations to construct, operate and maintain such telegraph, telephone and other lines necessary for the speedy transmission of intelligence along and over the public ways and streets of the cities and towns of that State. It was held in that case that a telephone company under its right to construct and operate a telegraph was empowered by statute to establish a telephone service. None of those cases involved a construction of the act of Congress; and the general language employed in some of them cannot be regarded as decisive in respect of the scope and effect of that act, however pertinent it may have been as to the meaning of the particular statutes under examination.

It may be that the public policy intended to be promoted by the act of Congress of 1866 would suggest the granting to

telephone companies of the rights and privileges accorded to telegraph companies. And it may be that if the telephone had been known and in use when that act was passed, Congress would have embraced in its provisions companies employing instruments for electrically transmitting articulate speech. But the question is, not what Congress might have done in 1866 nor what it may or ought now to do, but what was in its mind when enacting the statute in question. Nothing was then distinctly known of any device by which articulate speech could be electrically transmitted or received between different points, more or less distant from each other, nor of companies organized for transmitting messages in that mode. Bell's invention was not made public until 1876. Of the different modes now employed to electrically transmit messages between distant points, Congress in 1866 knew only of the invention then and now popularly called the telegraph. When therefore the act of 1866 speaks of telegraph companies, it could have meant only such companies as employed the means then used or embraced by existing inventions for the purpose of transmitting messages merely by sounds of instruments and by signs or writings.

In 1887 the Postmaster General submitted to the Attorney General the question whether a telephone company or line, offering to accept the conditions prescribed in Title LXV of the Revised Statutes (being the act of 1866), could obtain the privileges therein specified. Attorney General Garland replied: "The subject of Title LXV of Revised Statutes is telegraphs. In all its sections the words 'telegraph,' 'telegraph company' and 'telegram' define and limit the subject of the legislation. When the law was made, the electric telegraph, as distinguished from the older forms, was what the lawmakers had in view. The electric telegraph, when the law was made, as to the general public, transmitted only written communications. Its mode of conduct is yet substantially the same. This transmission of written messages is closely analogous to the United States mail service. Hence the acceptance of the provisions of the law by the telegraph company was required to be filed with the Postmaster Gen-

eral, who has charge of the mail service. Under the several sections embraced in the Title, in consideration of the right of way and the grant of the right to preëmpt 40 acres of land for stations at intervals of not less than 15 miles, certain privileges as to priority of right over the line, also the right to purchase, with power to annually fix the rate of compensation, were secured to the Government. Governmental communications to all distant points are almost all, if not all, in writing. The useful Government privileges which formed an important element in the legislation would be entirely inapplicable to telephone lines, by which oral communications only are transmitted. A purchase of a telephone line certainly was not in the mind of the lawmakers. In common and technical language alike, telegraphy and telephony have different significations. Neither includes all of the other. The science of telephony as now understood was little known as to practical utility in 1866, when the greater part of the law contained in the Title was passed. Telephone companies therefore are not within the 'category of the grantees of the privileges conferred by the statute.' If similar privileges ought to be granted to telephone companies, such a grant would come within the scope of legislative rather than administrative power." 19 Opinions Attorney General, 37.

It is not the function of the judiciary, because of discoveries after the act of 1866, to broaden the provisions of that act so that it will include corporations or companies that were not, and could not have been at that time, within the contemplation of Congress. If the act be construed as embracing telephone companies, numerous questions are readily suggested. May a telephone company, of right, and without reference to the will of the States, construct and maintain its wires in every city in the territory in which it does business? May the constituted authorities of a city permit the occupancy only of certain streets for the business of the company? May the company, of right, fill every street and alley in every city or town in the country with poles on which its wires are strung, or may the local authorities forbid the erection of any poles at all? May a company run wires into every house in a city, as

the owner or occupant may desire, or may the local authorities limit the number of wires that may be constructed and used within its limits? These and other questions that will occur to every one indicate the confusion that may arise if the act of Congress, relating only to telegraph companies, be so construed as to subject to national control the use and occupancy of the streets of cities and towns by telephone companies, subject only to the reasonable exercise of the police powers of the State. But even if it were conceded that no such confusion would probably arise, it is clear that the courts should not construe an act of Congress relating in terms only to "telegraph" companies as intended to confer upon companies engaged in telephone business any special rights in the streets of cities and towns of the country, unless such intention has been clearly manifested. We do not think that any such intention has been so manifested. The conclusion that the act of 1866 confers upon telephone companies the valuable rights and privileges therein specified is not authorized by any explicit language used by Congress, and can be justified by implication only. But we are unwilling to rest the construction of an important act of Congress upon implication merely; particularly if that construction might tend to narrow the full control always exercised by the local authorities of the States over streets and alleys within their respective jurisdictions. If Congress desires to extend the provisions of the act of 1866 to companies engaged in the business of electrically transmitting articulate speech — that is, to companies popularly known as telephone companies, and never otherwise designated in common speech — let it do so in plain words. It will be time enough when such legislation is enacted to consider any questions of constitutional law that may be suggested by it.

Something was said in argument as to the power of Congress to control the use of streets in the towns and cities of the country. Upon that question it is not necessary to express any opinion. We now adjudge only that the act of 1866, and the sections of the Revised Statutes in which the provisions of that act have been preserved, have no applica-

tion to telephone companies whose business is that of electrically transmitting articulate speech between different points.

What rights the appellee had or has under the laws of Virginia and the ordinances of the city of Richmond is a question which the Circuit Court did not decide, but expressly waived. It is appropriate that that question should first be considered and determined by the court of original jurisdiction.

The decree of the Circuit Court of Appeals so far as it reverses the decree of the Circuit Court is affirmed, and the cause is remanded with directions for such further proceedings in the Circuit Court as may be in conformity with the principles of this opinion and consistent with law. It is so ordered.